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SUPREME COURT OF THE UNITED STATES.

No. 114.

CLINTON WALWORTH, PLAINTIFF IN ERROR,

vs.

JAMES KNEELAND AND HANNAH M., HIS WIFE, AND FRANCES CORNELIA FOSTER AND WM. FOSTER, INFANTS, BY THEIR NEXT FRIEND, JAMES KNEELAND.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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Gideon, printer.

Placita.

Pleas before the supreme court of the State of Wisconsin, sitting as a court of chancery, at the Capitol in Madison, the seat of government of said State, at the June term thereof, to wit, on the third Tuesday, the seventeenth day of June, in the year of our Lord one thousand eight hundred and fifty-one.

Present, the honorable Levi Hubbell, chief justice, and the honorables Charles H. Larabee, Timothy O. Howe, Edward V. Whiton, Mortimore M. Jackson, and Wiram Knowlton, associate judges of said court; Jerome R. Brigham, clerk.

Memorandum.

Be it remembered, that heretofore, to wit, on the eighth day of April, in the year of our Lord one thousand eight hundred and fifty-one, came into the office of the clerk of the supreme court of the said State of Wisconsin, Clinton Walworth, by Jason Downer and E. G. Ryan, esquires, his solicitors, and filed in the said clerk's office his appeal from a certain order or decree of the circuit court of Milwaukee county, in said State, entered in a certain cause in which James Kneeland and Hannah M. Kneeland, his wife, Frances Cornelia Foster, by her next friend, James Kneeland, and William G. Foster, by his next friend, James Kneeland, were complainants, and Clinton Walworth and Phœbe A. Walworth, his wife, George Reed, and Augustus Story, were defendants; and also his bond for such appeal, together with the transcript of the record of the proceedings of said circuit court, and the original papers in said cause; which said appeal, appeal bond, transcript, and original papers, are in the words and figures following, to wit:

Appeal.

CIRCUIT COURT, *Milwaukee county.*

JAMES KNEELAND and Hannah M. Kneeland, his wife, Frances Cornelia Foster, by her next friend, James Kneeland, and William G. Foster, by his next friend, James Kneeland,
vs.
CLINTON WALWORTH and Phœbe Walworth, his wife, George Reed, and Augustus Story.

The defendant, Clinton Walworth, hereby states to this honorable court that he appeals, and he does hereby appeal, to the supreme court of the State of Wisconsin, from the final order or decree entered in the above entitled cause on the twenty-seventh day of January, in the year

eighteen hundred and fifty-one, and the defendant prays that the same may be sent to the supreme court before the judges thereof. Dated March 24th, 1851.

C. WALWORTH,
J. DOWNER & RYAN,
Solicitors for defendant, Walworth.

Allowance of appeal.

Endorsement on the back.

"Let a bond on the within appeal be executed pursuant to the statute, with one or more sureties, in the penal sum of two hundred dollars"

"LEVI HUBBELL.

"*March* 24, 1851."

Bond on appeal.

Know all men by these presents, that we, Clinton Walworth, principal, and Jason Downer, surety, are held and firmly bound unto James Kneeland, Hannah M. Kneeland, Frances Cornelia Foster, and William G. Foster, in the penal sum of two hundred dollars, to be paid to the said James Kneeland, Hannah M. Kneeland, Frances Cornelia Foster, and William G. Foster, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Signed and sealed this day of March, 1851.

The condition of this obligation is such, that whereas the said Clinton Walworth has appealed to the supreme court of the State of Wisconsin from the order or decree of the circuit court of the county of Milwaukee, State of Wisconsin, made the 27th day of January, 1851, in a certain cause in said court, on the chancery side thereof, wherein James Kneeland and Hannah M. Kneeland, his wife, Frances Cornelia Foster by her next friend, James Kneeland, and William G. Foster by his next friend, James Kneeland, are complainants; and Clinton Walworth and Phœbe Walworth, his wife, George Reed, and Augustus Story, are defendants. Now if the said Clinton Walworth shall pay, satisfy, and perform the order or decree of the supreme court, and all costs, in case the *the* decree or final order of the circuit court shall be affirmed, then this obligation to be void, otherwise of force.

C. WALWORTH, [SEAL.]
JASON DOWNER. [SEAL.]

Sealed and delivered in presence of—

Justification.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Jason Downer, the within named surety, being duly sworn, doth depose and say, that he is a householder, resident within the State of Wis-

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consin, and that he is worth the sum of two hundred dollars over and above all debts and demands against him.

JASON DOWNER.

Subscribed and sworn to before me, this 20th day of March, 1851.

HENRY K. WHITE,
Clerk and Register.

Transcript of record.

June term, 1848.

GUSTAVUS A. FOSTER vs. CLNTON WALWORTH, Phœbe Walworth, George Reed, and Augustus Story.	At. Stow, Holliday, Brown, and Ogden. J. Downer and E. G. Ryan.

November 10, 1847, comes the complainant by his solicitor, and files his bill of complaint. Same day, injunction allowed. Complainant to give bond with surety in the penalty of $200. Conditioned to pay damages and costs. Injunction issued same day, returnable to the next term. Also subpœna issued same day, returnable on the 24th day of November, 1847. Injunction returned November 12, 1847. Endorsed as follows, to wit:

"Personally served this writ on Clinton Walworth, and gave him a copy. Not served on George Reed and Augustus Story, they not being found in the county.

"Fees, $1 56. GEO. E. GRAVES, *Sheriff.*

"*November* 12, 1847."

Also subpœna returned same time, endorsed as follows, to wit:

"Personally served this writ on Phœbe A. Walworth and Clinton Walworth, and gave them a copy.

"November 12, 1847.

"The within named George Reed and Augustus Story not found in the county. My fees, $2 00.

"GEO. E. GRAVES, *Sheriff.*"

Also endorsed as follows:

"I admit due service of the within subpœna, and pray my appearance to be entered.

"*November* 12, 1847. GEO. REED."

November 26, 1847.

The subpœna in this cause having been returned by the sheriff of Milwaukee county, duly served personally upon the defendants, Clinton Walworth and Phœbe A. Walworth, and the said George Reed having endorsed his appearance on the said subpœna, and the

sheriff having returned that the said Augustus Story was not to be found in the said county, on motion of Mr. Stow, for complainant,

Ordered, That the said Clinton Walworth, Phœbe A. Walworth, and George Reed, plead, answer, or demur to the said complainants' bill within thirty days, or that the same be taken as confessed.

January 5, 1848.

On motion of defendant and affidavit filed, the time for pleading extended to the first day of February next.

February 5, 1848.

The time for filing plea, answer, or demurrer, is enlarged to the first day of March next. Answer of Clinton Walworth and Phœbe Walworth filed March 1st, 1848. Replication filed March 20, 1848, and issue joined. January 6, 1849, continued.

September 26, 1849.

And now comes the defendant, and moves the court now here, that this suit be abated for reasons filed, and suggests the death of the complainant upon the record. October 1, 1849, continued.

Special term, December 11, 1849.

On motion of Holliday, Brown, and Ogden, solicitors for James Kneeland and Hannah M. Kneeland, his wife, Frances Cornelia Foster, and William Foster, who appear by their next friend, James Kneeland, it is ordered, that the bill of complaint in this cause filed, be and do stand absolutely revived; and that the said James Kneeland and Hannah M. Kneeland, his wife, and Frances Cornelia Foster, and William G. Foster, by their next friend, James Kneeland, be substituted for Gustavus A. Foster, and to all his rights in this cause, and be in the same plight and condition as was the said Gustavus at the time of his death, and that this cause be conducted to a final decree in the names of the said complainants so substituted.

December 12, 1849.

On motion of J. Downer, solicitor for defendant, Clinton Walworth and Phœbe, his wife, it is ordered by the court, that testimony in this cause be taken by either complainants or defendants, or any of them, before Mr. Tenny, court commissioner for this county, at any time, on five days' notice to the opposite party, or his or their solicitors. Testimony to be closed on or before the first day of the next February term of this court.

March 7, 1850.

On motion of J. Downer, solicitor for defendant, Clinton Walworth, it is ordered, that the order herein before entered in this cause to close testimony be, and the same hereby is, opened, and that either party

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may take testimony in this cause at any time previous to the 3d day of May next, on giving notice to the other party, before Mr. Tenny, court commissioner for said county, or in any other way, according to law. Testimony in said cause to be closed by the 3d Monday of May next.

March 5, 1850.

October 9, 1850.

And now come the parties by their solicitors, and file their certain stipulation in the words and figures following, to wit:

It is stipulated and agreed, by and between the parties to this suit, that it is hereby, and shall be, admitted as evidence in this cause that the land described in the bill in this cause is part of the lands granted or given by the United States to the Territory of Wisconsin by an act of Congress, approved June 18, 1838, entitled "an act to grant a quantity of land to the Territory of Wisconsin, for the purpose of aiding in opening a canal to connect the waters of Lake Michigan with those of Rock river," and that the quarter section [of] land alluded to in the pleadings to have been purchased by this defendant, was purchased by him from the Territory of Wisconsin.

(Signed) J. DOWNER,
Defendant Walworth's solicitor,
HOLLIDAY,
BROWN and
OGDEN,
Complainants' solicitors.

Same day came the parties by their solicitors respectively, and this cause came on to be argued, and the arguments proceeded, and progressing through the day, and not being concluded, the court adjourned until nine o'clock to-morrow morning.

October 10, 1850.

Court opened pursuant to adjournment, and the argument of this cause proceeded, and being concluded by counsel, the court held the same under advisement, and took time to consider of its opinion. Same day court adjourned and cause continued.

Extra term, January 27, 1851.

And now, at this day, the court being well and sufficiently advised, &c., doth order, adjudge, and decree, that the said defendant, Clinton Walworth, do convey to the said complainants one equal undivided half of the said premises, freed from the said mortgage to the Territory, and that the other defendants be barred and restrained from asserting or enforcing any right or claim to such half. February 8, 1851, continued. March 7, 1851, continued.

Special term, March 24, 1851.

Comes the said defendant, Clinton Walworth, by his solicitors, Ry-

an and Downer, and files his appeal bond, and enters his appeal to the supreme court of the State of Wisconsin, in the words and figures following, to wit:

JAMES KNEELAND and Hannah M. Kneeland, his wife, Frances Cornelia Foster, by her next friend, James Kneeland, and William G. Foster, by his next friend, James Kneeland,
vs.
CLINTON WALWORTH, Phœbe A. Walworth, his wife, George Reed, and Augustus Story.

The defendant, Clinton Walworth, hereby states to this honorable court, that he appeals, and he hereby does appeal, to the supreme court of the State of Wisconsin from the final order or decree entered in the above entitled cause on the twenty-seventh day of January, in the year eighteen hundred and fifty-one, and the defendant prays that the same may be sent to the supreme court before the judges thereof.

Dated March 24th, 1851.

C. WALWORTH,
J. DOWNER and
RYAN,
Solicitors for defendant Walworth.

Certificate.

STATE OF WISCONSIN,
Circuit court, Milwaukie county, ss.

I, Henry K. White, clerk of said court, do hereby certify, that the foregoing is a correct transcript of the docket entries in the above entitled cause, as the same remain of record in my office, and that it is the whole thereof; and that the papers herewith returned, marked 1 to 30 inclusive, are all the papers on file in said cause.

In testimony whereof I have hereto set my hand and affixed the [L. S.] seal of said court, this twenty-seventh day of March, A. D. 1851.

HENRY K. WHITE,
Clerk and register.

Bill.

Milwaukee district court. In equity.

To the honorable Andrew G. Miller, judge of the third judicial district.

Humbly complaining, shows unto your honor, your orator, Gustavus A. Foster, of Port Washington, Washington county, that on or shortly previous to the twenty-sixth of March, eighteen hundred and thirty-eight, a negotiation was had, by and between one Jonathan E. Arnold and Clinton Walworth, (whom, together with his wife, Phœbe

A., your orator prays may be made defendants to this bill,) in regard to the purchase, by the said Arnold, of an undivided half of the south half of section 35, in town. 8, range 17 east, now in Waukesha county, to which said half section of land the said Walworth had, or pretended to have, some right or claim ; and that thereupon, for a valuable consideration paid by the said Arnold, the said Walworth agreed to purchase, as soon as possible, of the Government the said half section, and immediately convey, or cause to be conveyed, the undivided half thereof to the said Arnold, his heirs, or assigns, by a good warranty deed, free of all encumbrances ; and your orator further shows that, for the purpose of securing to the said Arnold and his representatives the performance of the said agreement on the part of the said Walworth, the said Walworth, on the said twenty-sixth day of March, eighteen hundred and thirty-eight, executed, under his hand and seal, to the said Arnold a bond in the sum of one thousand dollars, payable to the said Arnold, his executors, administrators, and assigns, conditioned that the said Walworth would, as soon as possible, purchase, or cause to be purchased, of the Government the said south half of section 35, and would immediately convey, or cause to be conveyed, the undivided half thereof, by a good and sufficient warranty deed, free of all incumbrances, to the said Arnold, his heirs or assigns.

Your orator further shows, that about the third of July, in the year eighteen hundred and thirty-nine, in part performance of the said agreement, and the condition of the said bond, the said Walworth purchased of the Government of this Territory the southeast quarter of the said section of land, receiving from the territory a conveyance therefor, and executing at the same time a mortgage to the said Territory upon the said quarter section, for securing the payment of the sum of three hundred dollars and twenty-four $\frac{00}{100}$ dollars, part of the purchase money of the said quarter section ; and your orator further shows, that although the said Walworth might have purchased of the Government the southwest quarter of the said section, as well as the southeast quarter, he did not do so, and that the same was purchased by some other person; and that the said Walworth has not, and never has had, title to the said southwest quarter section, and is not able to make a title to any part thereof.

Your orator further shows, that he is informed and believes, and charges, that after the making of the said bond and agreement, the said Arnold, under and by virtue thereof, went into possession of the said southeast quarter section, and made, or caused to be made, improvements thereon.

Your orator further shows, that in November, eighteen hundred and forty-six, being desirous of purchasing the said southeast quarter section for agricultural purposes, and being informed, and believing that the said Arnold was the owner thereof, he applied to the said Arnold for the purchase thereof; that the said Arnold informed your orator that he had not the legal title thereto, but believed himself to be the real and equitable owner thereof, under and by virtue of the said agree-

ment and bond; and that inasmuch as the said Walworth was not able to make a title, according to the terms of the said agreement and bond, to the undivided half of the said half section, but could make a good title to the whole of the said southeast quarter section, and the whole of the said southeast quarter section not being more valuable than the undivided half of the said half section, he, the said Walworth, would be willing to convey the whole of the said southeast quarter section to the said Arnold, or his assignee, in extinguishment of the said bond. Your orator further shows, that he thereupon consulted counsel, who informed him that by the said agreement and bond, and the said Walworth having the legal title to the said southeast quarter section, and not having, or being able to procure, the title to the other half of the said south half section, the said Arnold had become the equitable owner of the said southeast quarter section, and that your orator might safely purchase the same of him. Your orator did thereupon purchase of the said Arnold the said southeast quarter section, and also the said bond, for the consideration of three hundred and fifty dollars, which he paid to him, and did take from the said Arnold a deed of the said southeast quarter section, and an assignment of the said bond, both bearing date the twentieth of November, eighteen hundred and forty-six.

And your orator further shows unto your honor, that, believing that by means of the said deed and assignment he had acquired a right, and a complete equitable title, to the said southeast quarter section, and that he was entitled to the possession thereof, and would be protected therein, immediately after the said purchase from the said Arnold, he commenced making valuable and expensive improvements thereon; and that he has cleared and fenced about forty acres thereof, and ploughed and put the said forty acres into wheat.

And your orator further shows, that some time ago, and since the said purchase by him from the said Arnold, of the said land and bond, he applied in a friendly way to the said Walworth, (and who well knew of the said deed and assignment to your orator,) and requested him to convey to your orator, as the assignee of the said Arnold, the said undivided half of the said south half section, according to the condition of the said bond, offering and proposing to the said Walworth, at the same time, (as he could not make a title to the said undivided half of the said south half of the said section,) to accept in full satisfaction of the said bond a conveyance of the said southeast quarter section, with which request and offer the said Walworth refused to comply.

And your orator further shows unto your honor, that the said Phœbe A. (the wife of the said Clinton Walworth) has intermarried with him since the making of the said bond and agreement, and that she has no right of dower, or otherwise, in the said southeast quarter section, as against your orator.

And your orator further shows, that he has caused searches to be made for encumbrances upon the said land, and finds that there are judgments of record in this court in favor of George Reed, and also in

favor of Augustus Story, (both of whom your orator prays may be made defendants to this bill,) against the said Walworth, and which are apparently liens upon the said southeast quarter section, but which your orator shows unto your honor, and insists, are not justly liens as against your orator, and his rights and equitable title.

All of which doings, and claims, and refusals, are contrary to equity and good conscience, and tend to the wrong and injury of your orator in the premises. In consideration whereof, and inasmuch as your orator is without remedy in a court of common law, and can only have relief in the equity side of this court, where matters of this kind are property cognizable and relievable: To the end, therefore, that the said Clinton Walworth and Phœbe A., his wife, and the said George Reed, and the said Augustus Story, may answer this bill, and that the said Clinton Walworth may be decreed and ordered to perform specifically with your orator, as assignee of the said Arnold, his said agreement and the condition of the said bond, by conveying to your orator the said undivided half of the said south half of section 35; or if the said Clinton Walworth is unable to make to your orator, as assignee as aforesaid, a title free of encumbrance of the said undivided half of the said south half section, that he may be ordered and decreed to convey to your orator the said southeast quarter section free of encumbrance, (your orator hereby offering to accept the same in discharge of the said bond,) and that the cloud upon your orator's title by reason of the said judgments in favor of the said Augustus Story, and in favor of the said Geo. Reed, and also by reason of the said marriage of the said Phœbe A., may be removed. And that, in the mean time, the said Clinton Walworth may be restrained from encumbering or conveying the said land, or commencing any suit or proceeding at law against your orator in regard thereto; and that the said Augustus Story and the said George Reed may be restrained from any proceedings upon their respective judgments against the said land.

May it please your honor, the premises considered, to grant unto your orator, not only a writ of injunction to restrain the said Clinton Walworth from conveying or encumbering the said land, or commencing any suit at law against your orator in regard to the same, and also to restrain the said George Reed and the said Augustus Story from proceeding upon their said judgments against said land; but also a writ of subpœna, issuing out of and under the seal of this court, requiring the said Clinton Walworth and Phœbe A., his wife, and the said George Reed and Augustus Story, to appear in this court, on some day to be named in said subpœna, and to answer this bill according to the practice and usage of this court, and to abide by and perform such order or decree as may be made in the premises; and that your orator may have such other or such further relief as your honor may deem proper, and as shall be agreeable to equity.

And your orator will ever *ever* pray, &c.

G. A. FOSTER,
A. W. STOW, *Solicitor.*

TERRITORY OF WISCONSIN,
Milwaukee county, ss.

On this 9th day of November, 1847, came before me the above named complainant, Gustavus A. Foster, who being by me duly sworn, did depose and say, that he had read the above bill of complaint, signed by him, and that the same was true of his own knowledge, except such parts thereof as are stated to be upon information and belief, and that as to such parts he believed the same to be true.

JOHN WHITE, *Notary public.*

Answer.

In chancery.

The joint and several answer of Clinton Walworth and Phœbe Ann Walworth to the bill of complaint of Gustavus A. Foster, complainant.

These defendants, now and at all times hereafter, saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants answering say: That they admit that the said Phœbe A., the wife of said Clinton Walworth, has intermarried with him since the making of the bond and agreement in complainant's bill of complaint mentioned, to wit, on the 15th day of October, A. D. 1846, but deny that said Phœbe A., by virtue of such marriage, has no right of dower or interest in the southeast quarter of section thirty-five, the said premises mentioned in complainant's bill, as against said complainant as in said bill alleged, but aver the contrary of such allegation to be true.

This defendant, Clinton Walworth, answering saith, that on or about the 23d of January, 1838, one Russel Frisbie, of Milwaukee county, in this Territory, came to this defendant, and represented that he had an interest in, and claim to, the south half of section 35, township 8 N., range 17 east, the premises mentioned in complainant's bill, and that upon said half section there was a mill site or water power of great value, to wit, of the value of one thousand dollars, or more, and offered to sell the undivided half of his claim to the same to this defendant for the sum of three hundred dollars, or thereabouts. This defendant did purchase the undivided half of said claim from said Frisbie, upon the following terms, to wit: Said Frisbie, on said 23d day of January, executed under his hand and seal to this defendant a quit-claim deed to the equal undivided half of said half section, for the nominal consideration expressed therein of one dollar, but the real consideration of about the sum of three hundred dollars, paid, and secured to be paid, as hereinafter mentioned, to wit, one hundred dollars,

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paid at the time and shortly thereafter, in money and provisions, as then agreed; and, as a further payment, the defendant should purchase from the United States Government said Frisbie's half of said claim, at a price not exceeding one dollar and twenty-five cents per acre, said Frisbie to remain in possession of said half section until the same should come into market; which said sum of one hundred dollars, paid as aforesaid, and the purchase of said Frisbie's half of said land from Government, at ten shillings per acre, was the consideration paid, and to be paid, by this defendant to said Frisbie for the half of said claim. This defendant avers that he did thereupon execute to said Frisbie a bond, in substance, as follows: In the penal sum of one thousand dollars, conditioned that said Frisbie should retain the possession of said claim until it could be purchased from the United States Government, and that this defendant should purchase the same at ten shillings per acre, if he should be able so to do, and immediately convey the undivided half thereof to said Frisbie, or his assigns; which said bond is not in the possession of this defendant, and is, as he believes and so avers, either lost, concealed, or destroyed; and the deed aforesaid this defendant says is now in his possession, and ready to be produced as this court shall direct. This defendant says that said conveyance of said tract of land by deed as aforesaid was all the consideration this defendant received from said Frisbie for said sum of one hundred dollars, paid as aforesaid, and for the execution of such bond as aforesaid; that said tract of land at the time was the property of the United States, and not of said Frisbie; and saith, and so avers the fact to be, that said Frisbie had no interest or estate in said land; that by his conveyance as aforesaid to this defendant, he did not and could not, convey any interest whatever in said land, or any part or parcel thereof, but that said conveyance was wholly worthless and inoperative in law.

This defendant further answering saith, that on or about the 24th day of March, 1838, said Frisbie and Jonathan E. Arnold, named in said complainant's bill, applied to this defendant, and informed him, this defendant, that said Frisbie had sold to said Arnold his interest in said tract of land, but for what sum this defendant does not recollect, and expressly denies that said Arnold ever paid this defendant any consideration whatever for the execution of said bond in said complainant's bill mentioned; that at the time last aforesaid, at the request of said Frisbie and Arnold, and with the express understanding that this defendant should assume no greater liability than was contained in said Frisbie's bond aforesaid, and upon the execution of a bond and quit-claim deed of the residue of said tract by said Frisbie, as hereinafter stated, and upon the mutual understandings, agreements, and representations of said Arnold to and with this defendant, as hereinafter set forth, this defendant did execute the bond mentioned in complainant's bill, but which said bond this defendant avers is in the possession of said complainant, or his solicitor, and not in said bill in substance set forth; and prays that the same may be produced as this court may require.

This defendant further saith, that he, this defendant, had not seen the said tract of land aforesaid at the time of making the said bond to said Arnold, and relied wholly upon the representations of said Frisbie, both as to the value and existence of a water power upon the southeast quarter thereof, as well as to the situation of said land; said Frisbie representing that said water power was upon the Oconomowoc river, running through the S. E. quarter of said tract, and of great value, to wit, one thousand dollars or more; and that there was no place above said water power to his knowledge, and as he believed, where a dam could be placed so as to interrupt the water power below; yet as a matter of precaution, a claim could be made to the quarter through which said river run, on the north or northeast of said half section, which quarter extended to or nearly to the lake on the north, but he could not then say what the description of the quarter section was through which said river run on the north. This defendant says, that the main inducement of both this defendant and said Arnold in purchasing from said Frisbie was to secure a title from Government to the valuable water power supposed to exist upon the southeast quarter of said tract of land, that said Arnold agreed with this defendant that this defendant should claim said quarter on the north or northeast, as soon thereafter as the proper description thereof could be ascertained by said Arnold and this defendant; and that upon the purchase of said several tracts from Government said Arnold should furnish one-half of the sum of money necessary to purchase such additional quarter section, the description of which said additional quarter it was agreed should be left blank at the time of the execution of said bond to Arnold, and should be inserted therein at a subsequent time, that is to say, when the same could be ascertained; this defendant says, that it was expressly agreed between said Arnold and this defendant, that such improvements as might be necessary to secure such water power, the construction of a dam across the river if necessary, and the improvements upon said tracts of land, sufficient to hold the same as claims pursuant to the settlers' rules and regulations as hereinafter mentioned, should be made at the joint costs and expense of said Arnold and this defendant, said Arnold furnishing his full proportion of the expenses thereof; that subsequently, in the said month of March aforesaid, after the execution and delivery of such bond, this defendant and said Arnold ascertained the quarter section through which said river run on the north to be the northwest quarter of section 36, in the same town and range with said half section aforesaid, as the quarter section to be inserted and intended to be described in said bond to Arnold as aforesaid; that this defendant did immediately thereafter, with the full knowledge of said Arnold, make claim to said additional quarter, to wit, the northwest quarter of of section 36 aforesaid, by registering the same in the claim register, kept by J. A. Lapham, pursuant to the agreement aforesaid, and the settlers' rules and regulations as aforesaid, but that said Arnold failed to have the description thereof inserted in said bond given to him and in his possession pursuant to the agreement aforesaid. This defendant avers

1766.

that there were no improvements in said month of March upon said northwest quarter of section 36, or upon the west half of said south half of section 35 aforesaid.

This defendant further answering saith, that said Frisbie did execute and deliver to this defendant a quit-claim deed or conveyance to the remaining half of said south half of section 35 aforesaid, on the and Arnold as aforesaid, for the nominal consideration expressed therein said 24th of March, 1838, pursuant to the said request of the said Frisbie of five hundred dollars, but without any real consideration being paid by this defendant, under the hand and seal of said Frisbie, which said deed is now in the possession of this defendant, and ready to be produced as this court may direct, and which deed this defendant avers was and is wholly worthless and inoperative in law; and further says, that as an inducement to this defendant, and as a condition precedent for the cancelling of the bond given by this defendant to said Frisbie, and the execution of said bond to said Arnold, and as a part of the same transaction, as a surety that he, said Frisbie, would not molest this defendant in his possession of said tract of land, by bidding upon him at the public sales of said land by the United States, or by reason of any right of pre-emption which he might thereafter acquire on account of his occupation of said tract or any part thereof, and that this defendant should be entitled to the benefit of any pre-emption to which the said Frisbie might thereafter be entitled, said Frisbie, with the full knowledge and assent of said Arnold, executed to this defendant a bond in substance as follows, to wit:

Know all men by these presents, that I, Russel Frisbie, of the county of Milwaukee, and Territory of Wisconsin, am held and firmly bound unto Clinton Walworth, esq., of the county of Milwaukee, and Territory of Wisconsin, in the penal sum of one thousand dollars, lawful money of the United States, to be paid to the said Walworth or his certain executors, administrators, or assigns; to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, and every of them, by these presents. Witness my hand and seal this 24th day of March, A. D. 1838.

The condition of the above obligation is such, that whereas the above bounden Russel Frisbie has this day sold to the said Walworth the following piece or parcel of land, commonly called a claim, to wit, the south half of section thirty-five, in township No. eight north, of range No. seventeen (17) east; now, therefore, if the said Frisbie has not previously disposed of the said claim to any other person or persons, and has good right to sell the equal undivided half of the same, having previously conveyed the other half to said Walworth, and if there is no adverse claim, in other words, if he is the rightful claimant, and has in no wise done any act, matter, or thing to impair his said right by sale or otherwise, and also if he shall, in case of pre-emption, suffer the said Walworth to prove the same up by reason of the improvements and labor done by the said Frisbie on said claim, and shall, at the expense of the said Walworth, furnish all necessary

evidence and information he is master of, to enable him so to prove up the same, and shall in no wise molest the said Walworth in his enjoyment of the same by reason of any such improvement so made by him, the said Frisbie, then this obligation to be null and void, otherwise to remain in full force and virtue.

(Signed) RUSSEL FRISBIE. [L. S.]

In presence of—F. A. WINGFIELD,
J. E. ARNOLD.

Which said bond last aforesaid this defendant avers was and is contrary to law and the policy of law, and of no binding force and validity whatever.

This defendant further says, that he expressly understood, at the time of the execution of said bond to said Arnold, and so avers the fact to be, that he, this defendant, was not to, and did not, assume any greater liability by the execution thereof than the purchase, at the minimum government price of the public lands, ten shillings per acre, of said half section, and of such additional quarter section, (said Arnold furnishing him one hundred dollars as his equal part of the purchase money of such additional quarter section,) and the conveyance of the equal undivided half of said several tracts of land to said Arnold and his assigns, and as will appear by the condition of said bond to Arnold mentioned in complainant's bill, when produced, and which this defendant avers to be in substance as follows:

Know all men by these presents, that I, Clinton Walworth, of Milwaukee, counsellor at law, am held and firmly bound unto Jonathan E. Arnold, of said Milwaukee, in the sum of one thousand dollars, to be paid to the said Arnold, his executors, administrators, and assigns; to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated at Milwaukee, this 26th day of March, 1838.

The condition of this obligation is such, that if the above bounden Clinton Walworth shall and do, as soon as possible, by pre-emption, at public sale, by private entry, or otherwise, purchase, or cause to be purchased, at government price, and at his own cost and expense, the following described tract of land, situate in the county of Milwaukee, to wit, the south half of section (35) thirty-five, town[ship] eight, (8) range seventeen, (17) and immediately convey or cause to be conveyed to the said Arnold, his heirs or assigns, the equal undivided half part of the same by a good and sufficient deed of warranty, free of all encumbrance, and shall and do, as soon as possible, purchase from Government the following described quarter section of land now claimed by the said Walworth on the books of register of claims, to wit, , and immediately convey an undivided half of the same to said Arnold, his heirs or assigns, provided the said Arnold, his heirs or assigns, shall furnish to the said Walworth one-half of the sum of money necessary to purchase said quarter section, to wit, the sum of

one hundred dollars, this obligation shall be null and void, otherwise shall remain in full force and virtue.

(Signed) CLINTON WALWORTH. [L. S.]

Signed, sealed, and delivered in presence of—
JOHN S. ROCKWELL.

Which said bond given to said Arnold as aforesaid by this defendant, this defendant believes, and so avers the fact to be, to have been executed by this defendant without any consideration whatever having passed to this defendant by virtue of said worthless conveyance of said Frisbie, or by virtue of the worthless bond of said Frisbie to this defendant as aforesaid, and avers that said bond mentioned in complainant's bill as aforesaid was and is contrary to law and the policy of the law, and of no binding force or validity whatever.

This defendant, Clinton Walworth, further answering says, that the term "government price," used in said Arnold's bond last aforesaid as the price at which this defendant undertook to purchase the said tract of land firstly in said bond mentioned, was understood by this defendant at that time, and at all times since, as well as by said Arnold and Frisbie, as this defendant fully believes and so avers, to be the United States' minimum government price of the public lands, to wit, one dollar and twenty-five cents per acre, and making the sum to be advanced, and intended to be advanced, by this defendant in the purchase of the undivided half of the south half of section 35 aforesaid, for the benefit of said Arnold or his assigns, of about two hundred dollars; which sum, together with the sum of one hundred dollars paid by this defendant to said Frisbie as aforesaid, made up the amount of three hundred dollars or thereabouts, as the amount which was paid, and to be paid, to said Frisbie by this defendant, for the undivided half of the south half of section 35 aforesaid, so sold and conveyed by said Frisbie to this defendant as herein before first aforesaid.

This defendant further avers, that said term "government price" so used in said Arnold bond as aforesaid, as the price at which this defendant was to purchase said south half of section 35, as aforesaid, was then, and still is, a term in common use in the Milwaukee land district, within which said lands are situated, as well as in this Territory, and by common acceptation taken for, and understood to be and mean, the minimum price of the unsold lands of the United States Government, as fixed by the public laws of the United States, to wit, one dollar and twenty-five cents per acre, and as such was at the time of making and executing the bond in complainant's bill mentioned, in common use in making contracts between individuals, relative to the sale and purchase of claims upon the public lands of the United States within said Milwaukee land district. And this defendant saith, that in the execution of said bond to Arnold as aforesaid, he did not intend to assume any greater liability than the purchase, at the minimum government price of one dollar and twenty-five cents per acre, of said south half of

section 35, and of the NW. quarter of 36, ascertained as aforesaid, and intended to be described in said bond said Arnold, or his assignee; furnishing this defendant one-half of the sum of money necessary to purchase such additional quarter section of section 36 from the United States Government, at or after a public sale of the land in said Milwaukee land district, which was contemplated at the time of the execution of said bond by this defendant, and said Arnold and Frisbie, would take place either during said year 1838, or at furthest thereafter, in the year 1839; and the conveyance of the undivided half of the same to said Arnold, or his assigns, if the said defendant should be able to retain possession, and purchase the same from the United States Government aforesaid.

This defendant further says, that at the time, and for some time after, the execution of said bond to Arnold, said tracts of land described, and intended to be described, as aforesaid therein, was and were the property of the United States, and were parts and parcels of the unsold lands of the United States, and not in market at the time, or previously thereto for sale. And this defendant avers, that at the time of the execution of the said bond to Arnold, neither this defendant nor said Frisbie had any title or interest whatever in said tracts of land. And this defendant saith, and so avers the fact to be, that said Frisbie held said south half of section 35, at and previous to the time of said several conveyances to this defendant, as a claim, made pursuant to the rules and regulations of a combination of the settlers upon the public lands within the Milwaukee land district, combined together to prevent, by force, the bidding at the public sales of such lands as should be claimed in pursuance of such rules and regulations, a greater sum than one dollar and twenty-five cents per acre, and to protect each settler and claimant in the possession of the tract or tracts claimed, pursuant to the rules of such combination, by force, and club or lynch law; which combination of the settlers as aforesaid, this defendant avers, were unlawful and contrary to law; and avers that said Frisbie did not, and could not, convey any title or interest in said south half of section 35 by his said worthless conveyances and worthless bond aforesaid.

This defendant further answering saith, that previous to, and at the time of, the execution and delivery of said bond to Arnold, it was agreed between said Arnold and this defendant that this defendant should hold, and continue to hold, said tracts of land mentioned, until they should be brought into market by the United States, as claims pursuant to the claim rules and regulations aforesaid; said Arnold and this defendant to make all necessary improvements to hold the same until the said land should come into market, and to secure the said water power, pursuant to such regulations, at his, said Arnold's, and this defendant's joint cost and expense; that in accordance with such understanding and agreement this defendant, pursuant to such rules and regulations of the settlers as aforesaid, caused said south half of section 35 to be registered in the claim register kept by said Increase A. Lapham aforesaid, in the name of this defendant, to wit, in said month of

March, 1838, aforesaid. This defendant avers that it was necessary, in order for this defendant to hold and retain possession of said several tracts aforesaid in said Arnold bond mentioned, and intended to be described as aforesaid, in pursuance of such understanding and agreement as aforesaid, and of such settlers' rules and regulations as aforesaid, and in order to secure such valuable water power as aforesaid, to make improvements upon said several tracts of the value of two hundred dollars or more, and that said Arnold wholly failed and neglected to go on with this defendant, and make or cause such improvements or any part thereof to be made, and that in consequence of such failure and neglect this defendant lost the possession of the southwest quarter of said section 35, and the northeast quarter of said section 36, and became, and was wholly, unable to purchase the same, at government price as aforesaid, whereby, and by means whereof, said valuable mill sight and water power became utterly worthless.

This defendant, Clinton Walworth, further answering sayeth, that the Congress of the United States, by an act entitled "An act to grant a quantity of land to the Territory of Wisconsin, for the purpose of aiding in opening a canal to connect the waters of Lake Michigan with those of Rock river," approved June 18, 1838, granted to the Territory of Wisconsin the said south half of section 35 aforesaid, together with other lands, and increased the minimum price thereof to two dollars and fifty cents per acre; and by the same act increased the minimum price of the northwest quarter of section 36 aforesaid to the sum of two dollars and fifty cents per acre; and this defendant avers that thereby, and by means thereof, this defendant has been at all times hitherto wholly unable to purchase said lands at government price, and convey the same to said Arnold or his assigns, according to the true intent, tenor, and meaning of said bond so executed by this defendant to said Arnold.

This defendant, Clinton Walworth, further answering, admits that he purchased from the Territory of Wisconsin the southeast quarter of said section 35, on or about the 3d day of July, 1839, and received a conveyance therefor, and executed to the said Territory a mortgage upon the said quarter section, as is alleged in said bill; but denies that he purchased the said quarter section in part performance of the said agreement, and the condition of said bond executed to said Arnold as aforesaid, as is alleged in said complainant's bill; but says that it was wholly out of his power at that time, or at any time before or since, to purchase the whole or any part of the south half of said section 35 from the Government of the United States, at government price as aforesaid, and says that he was compelled to pay, and secure to be paid, to said Territory, double the government price of the public lands, to wit, the sum of two dollars and fifty cents per acre; but denies that, at the same time, he, this defendant, might or could purchase the southwest quarter of said section 35, as is alleged in said bill; and avers that at that time, or at any time before or since, this defendant has been wholly unable to purchase the said southwest quarter of section 35 from the

said United States Government, or from the Territory of Wisconsin, or otherwise, at government price; and denies that said Arnold, under, and by virtue of, the bond and agreement mentioned in said bill, after the making thereof, went into the possession of said southeast quarter of section 35, as in said bill alleged, and says that this defendant believes, and so avers the fact to be, that said Arnold did not make, or cause to be made, any improvements whatever upon said southeast quarter of section 35. And this defendant further avers, that any such improvements, if made at all as alleged in said bill, were made under, and pursuant to, the understanding and agreement herein before stated, to enable this defendant to hold possession of said south half of section 35, as a claim as aforesaid.

This defendant, Clinton Walworth, further answering says, that he had no knowledge of the sale and conveyance of said southeast quarter of section 35, and the assignment of said Arnold bond to said complainant in the month of November, 1846; nor of the terms of such sale, if any was made; nor of the consideration, if any paid by complainant to said Arnold; nor of the representations, if any made by said Arnold or complainant's counsel to said complainant; nor of the time when said complainant, if at all, took possession of said southeast quarter of section 35; nor of the amount, nature, or value of the improvements, if any, put by said complainant on said southeast quarter, as is alleged in said bill; but was wholly ignorant that said complainant had or claimed auy title or interest whatever in said quarter section, or was in possession thereof, as alleged in said bill, until about six weeks prior to the commencement of this suit, when this defendant was informed thereof by said complainant as herein after stated; and this defendant having no further or other knowledge of said several matters last aforesaid, neither admits or denies the same.

This defendant avers that said Arnold had not any equitable title or interest whatever in said southeast quarter of section 35, in said month of November, 1846, as alleged in said bill, nor at any time before or since, and did not, and could not by virtue of the deed and assignment mentioned in said bill, if made at all by said Arnold to said complainant, convey to, or confer upon, said complainant any title or interest, either equitable or otherwise, to or in said southeast quarter of section 35, of any name or nature whatever. This defendant further avers, that said complainant could not, and did not by virtue of such improvements upon, and possession of, said southeast quarter of section 35, as alleged in said bill, if such allegation be true, made and taken without the knowledge or assent of this defendant, have or obtain any equitable interest in said quarter section whatever; but that in entering upon said quarter, and making such improvements, said complainant was a mere trespasser.

This defendant admits that, in the latter part of the month of September, 1847, complainant, for the first and only time since the time of the alleged purchase from Arnold, as in said bill alleged, called upon this defendant, and informed this defendant that he had purchased

from said Arnold the southeast quarter of section 35, and that said Arnold had, in the month of November, 1846, executed to him a deed, and made an assignment to said complainant of the bond given by this defendant to said Arnold as aforesaid; and that he, complainant, was in possession of, and had made improvements upon, said quarter, when this defendant informed said complainant of his surprise, and that he had no knowledge whatever that said complainant had made such purchase, and was in possession of, and improving such quarter section, and then distinctly informed said complainant that such bond was worthless and without consideration, and that this defendant was both unable and unwilling to perform its conditions. This defendant denies that said complainant requested this defendant at that, (or any other time,) to convey to said complainant, as the assignee of said Arnold, the said undivided half of the said south half section, (35,) according to the condition of the said (Arnold) bond, offering and proposing to this defendant at the same time, as he (this defendant) could not make a title to the said undivided half of the said south half of the said section, to accept, in full satisfaction of the said bond, a conveyance of the said southeast quarter section, as is alleged in said bill, or in fact any proposition whatever on his part, as such assignee, for the conveyance of said south half section, or any part thereof, or of the southeast quarter thereof; but stated to this defendant that said Arnold had informed him, said complainant, that this defendant would be willing to make a title to him to the southeast quarter of said half section, in satisfaction of said bond; to which this defendant replied, that he considered himself under no obligation whatever to comply with the conditions of said Arnold bond.

This defendant, Clinton Walworth, further answering saith, that, in the months of February and March, 1839, there was a general public sale of the unsold lands in the Milwaukee land district aforesaid, by the United States Government aforesaid, as was contemplated by this defendant, said Arnold and said Frisbie, at the time of the execution of said Arnold bond, as the sale at which this defendant would be able to purchase said several tracts of land in said bond mentioned and intended to be described; but this defendant avers that said several tracts were within the limits of the grant made by said act of Congress aforesaid to said Territory, and that the south half of section 35 aforesaid was not at that time, nor at any time before or since, offered for sale, so as to enable this defendant to purchase the same at government price, according to the condition of said bond in complainant's bill mentioned. This defendant further avers, that the said northwest quarter of section 36 aforesaid was offered for sale by the United States in the fall of said year 1839, at the minimum price fixed by said act of Congress, to wit, two dollars and fifty cents per acre, and was subject to private entry at that price afterwards, but that said Arnold wholly failed and neglected to furnish this defendant with one-half of the money necessary to purchase the same, or any part of said money, according to the condition of said bond; that, in consequence of such neglect and failure, this de-

ponent was unable to purchase or enter the same at the land office, and avers that a part of said quarter was subsequently entered at said sum of two dollars and fifty cents per acre, and a dam erected across said Oconomowoc river thereon, by the purchaser thereof; which dam completely destroyed and rendered valueless the said mill site and water power upon said southeast quarter of 35 aforesaid.

This defendant, Clinton Woolworth, further answering avers, that in consequence of the said several matters herein stated and averred, said complainant, if he has purchased, as alleged in said bill, said southeast quarter of section 35 from said Arnold, had a full knowledge of the rights of the defendants in said bill named, and acted in his own wrong, and in violation of the rights of said defendants, and is entitled to no equity or relief from this court in consequence of any thing stated in said bill.

And this defendant, Phœbe A. Wolworth, on her own part answering says, that she does not know, and has never been informed, save by the said complainant's bill and the answer herein before of the said Clinton Walworth, her husband, which said answer she believes and avers to be true, of the said several matters in said complainant's bill of complaint, except as she has herein before answered and set forth. All of which matters and things these defendants are ready and willing to aver, maintain, and prove, as this court shall direct, and hereby pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

CLINTON WALWORTH,
PHŒBE A. WALWORTH.
C. WALWORTH, *Solicitor.*

Oath.

TERRITORY OF WISCONSIN,
Milwaukee county, ss.

On this 1st day of March, A. D. 1848, before me personally appeared the above named Clinton Walworth, and made oath that he has read the above answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information or belief, and as to those matters he believes it to be true.

A. HENRY BIELFELD,
Notary Public.

Oath.

TERRITORY OF WISCONSIN,
Milwaukee county, ss.

On this 1st day of March, A. D. 1848, before me personally appeared the above named Phœbe A. Walworth, and made oath that she has heard the foregoing answer by her subscribed read, and knows the contents thereof, and that the same is true of her own knowledge, ex-

cept as to the matters therein stated to be on her information and belief, and as to those matters she believes it to be true.

A. HENRY BIELFELD,
Notary Public.

Replication.

Milwaukee district court.

GUSTAVUS A. FOSTER, complainant,
vs.
CLINTON WALWORTH et al., defend't.

Replication of the complainant to the answer of Clinton Walworth and wife, two of the defendants.

This repliant, saving all exception to the said answer, for replication says, that he will aver and prove his said bill to be true and sufficient, and that the said answer is uncertain, untrue, and insufficient to be replied unto; without this that there is nothing in the said answer, material or effectual to be replied unto, confessed and avoided, traversed or denied, which is true. All of which the said complainant is ready to prove, and prays, &c.

A. W. STOW,
For complainant.

Stipulation.

In circuit court for the county of Milwaukee, State of Wisconsin.

GUSTAVUS A. FOSTER
vs.
CLINTON WALWORTH, Phœbe Walworth, George Reed, and Augustus Story, defendants. } In chancery.

It is hereby stipulated and agreed, that the deposition of Russel Frisbie may be taken, to be used as evidence in the above cause, before James Holliday, judge of probate, this 1st day of March, 1849.

JASON DOWNER,
Solicitor for defendant Walworth.
THOMAS L. OGDEN,
Solicitor for complainant.

Deposition of Russel Frisbie.

In the circuit court for the county of Milwaukee and State of Wisconsin.

GUSTAVUS A. FOSTER
vs.
CLINTON WALWORTH, Phœbe Walworth, George Reed, and Augustus Story, defendants. } In chancery.

In pursuance of the stipulation hereto annexed for the purpose of

taking the deposition of Russel Frisbie, a witness to be produced, sworn, and examined in the said cause, on behalf of the defendants, before Mr. James Holliday, judge of probate in and for the county of Milwaukee, on the 1st day of March, 1849, I did, on the 1st day of March aforesaid, cause to come before me the said Russel Frisbie, said witness; and the parties being present by their attorneys, Thomas L. Ogden on the part of the complainant, and Jason Downer on the part of the defendants; and the said Russel Frisbie, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows: I am acquainted with Gustavus A. Foster and Clinton Walworth; I know and have been upon section thirty-five, township No. eight, and range seventeen, in Waukesha county. In the year 1837 I made a claim on the south half of said section thirty-five. My improvements were on the southeast quarter of said section; my improvements consisted of a log house and some chopping. I moved into the house in February, 1838, after I had made the contract with Mr. Walworth in relation to said south half of section 35. I sold the undivided half of the south half of said section thirty-five for one hundred dollars cash, paid down, and Mr. Walworth was to pay for the land when it came into market; he was to pay for the whole south half of the section, and to make me a deed for the undivided half of the south half of said section thirty-five. Walworth was to purchase the land of the Government of the United States. We had no knowledge that an act had been passed granting lands for a canal at that time.

At the time of the contract I represented to Mr. Walworth that there was an excellent water power on the land. This was one of the main representations to induce him to purchase. I considered the power valuable. I was to keep possession of the property, make improvements upon it, in order to get a pre-emption upon it, if there could be one obtained. The land, if obtained by pre-emption, was to be obtained in my name, but Mr. Walworth was to furnish the money to pay for it, and gave a bond to that effect; and at the time I sold to Arnold it is my opinion that the bond and other papers were given up and destroyed—they were cancelled. If by way of pre-emption the title of the land came to me, Walworth furnishing the money to pay for it, then I was to convey to him one-half of it; he had my bond to that effect. The deed here shown and attached hereto, and marked A, was the original deed from me to Walworth, and its date is the day of the final consummation of the agreement between us. In the bond that Walworth gave to me it was stated that he was to pay the minimum government price. I went into the log house spoken of on the 9th day of February, after the date of the deed made exhibit A; I resided there by agreement with Walworth and me until December of the same year, about eleven months, and then left. In March, 1838, I sold my interest in the south half of said section thirty-five to Mr. Jonathan E. Arnold. I sold Arnold my right, and he came in to take my right and to stand in my place. I first proposed making a deed to Mr. Arnold, and we called at Mr. Walworth's office to consult him

about my transfer to Mr. Arnold, and he objected to it at first, saying, as I was on the land occupying it, in case I left it he might lose his pre-emption, or lose the land under the claimants' rules, as there would be no one there to keep possession. My impression is that Arnold said he would go on and make the improvements necessary to secure the land under the claim rules, the same as I was to have done. Mr. Walworth gave up the papers he had against me, and I gave up the bond I had of Mr. Walworth's; and instead of making a deed to Mr. Arnold, the purchaser, I by his (Arnold's) direction, made a quit-claim deed to Mr. Walworth. The deed here shown, and made exhibit B, is the deed made by me to Mr. Walworth by direction of Mr. Arnold. The bond here shown, and made exhibit C, is a bond that was executed at the same time the deed, made exhibit B, was executed, and was part of the arrangement between Walworth, Arnold, and myself. The agreement here shown, and made exhibit D, was executed at the time the deed, made exhibit B, and bond, made exhibit C, were executed, and was part of the agreement. The above papers, made exhibits B, C, and D, were all executed at or about the time they purport to be executed, and at the time of the conversation with Mr. Walworth above detailed. It is my recollection that at that time Mr. Walworth was to execute and deliver a bond to Mr. Arnold respecting this land. I don't know that there was any such bond executed at the time.

Plaintiff, by his counsel, Thomas J. Ogden, here objects to any testimony in relation to any other land than that above described.

(Witness) Walworth and Arnold asked me if there was any chance to get another water power above or below the one on this land, and that would injure the power above spoken of. I told them that there might be one obtained above that would injure it. Messrs. Arnold and Walworth then concluded that they would enter a claim in the claimant's books to the land on which the water power above this one was situated. Messrs. Arnold and Walworth subsequently went out and looked at the water power above the one on the land before described, and then concluded to lay claim to the northwest quarter of section thirty-six, in said township and range.

Curtis Read subsequently entered the part of the said northwest quarter of section thirty-six, on which the water power was located, and put up a saw mill on the same, as I was informed by said Reed. The improving of this water power on the northwest quarter spoiled the water power, above spoken of, on the land first described.

(The plaintiff's counsel here object to any evidence of any parol agreement or understanding between the parties, Walworth, Arnold, and witness, by which Walworth was to assume no additional responsibilities; the counsel also object to any evidence of any parol agreement between Arnold and Walworth.)

Witness. At the time I consummated the agreement with Mr. Arnold he was to assume my place, and Walworth was to treat him in

the same way he was me, if the trade between me and Arnold had not taken place.

After I left the claim, in 1838, I do not know of Mr. Arnold, or any other person, occupying the place—I was in the habit of seeing it frequently—unless Mr. Foster, the complainant, might have occupied the same. About two years ago I heard that Mr. Foster had bought the place. There were no material improvements on the place at that time. Soon after I heard that he had bought it, I had a conversation with Mr. Foster; he asked me what I thought the place was worth, and told me that he had purchased it from Mr. Arnold. I asked him if he had a deed of the place; he said he had. I told him I always supposed Mr. Walworth had an interest in the land. I think he said he had seen Walworth. He either said that he had seen Mr. Walworth, or that he had satisfied himself that Mr. Walworth had no interest in it. This is the inference I drew from the conversation.

This conversation was before or about the time Mr. Foster commenced making improvements upon the land. There are no improvements on the land, except those made by Mr. Foster and me. At the time the last quit-claim deed was made by me to Walworth, the general understanding was, that the government price of the land was $1 25 per acre. All the improvements that had been made up till the sale of canal lands in June, 1839, on the said land, had been made on the southeast quarter. There were no improvements on the southwest quarter up till the time of the land sale in June, 1839.

[The counsel for the defendant here proposes to prove that no part of the consideration mentioned in the deed, made exhibit B, came from Mr. Walworth. To this the plaintiff's counsel object.]

Witness. No part of the consideration mentioned in deed, made exhibit B, came from Mr. Walworth.

Witness cross examined by plaintiff's counsel.

At the time of the first agreement with Mr. Walworth, I did not know of the water power above the one I spoke to him about. At the time, I could not have had any definite knowledge of the water power above, and have no distinct recollection that there was any thing said about it. When I made the agreement with Mr. Walworth, I did not suppose that I need make improvements on any but the one quarter, in order to entitle me to hold the half section. My understanding at that time, and now, is, that if ten acres on any part of the half section were improved, I could hold the land. In the bond given by me to Mr. Walworth, the condition was that I should get a pre-emption, if I could, for the whole half section. If I did not succeed in getting the pre-emption, I was to make improvements sufficient to come in under the claim laws. My impression is, that in either event the title of the land was to come to me. I improved about three acres, enough to secure one quarter section before I left. I think it was expressed in the bond that Mr. Walworth was to pay for the land at the minimum

price of ten shillings per acre. This bond was given by Walworth to me. I was present at the time of the consummation of the agreement between Messrs. Walworth and Arnold, and this was at or about the time of the consummation of the agreement between me and Arnold.

The agreement made between Walworth and Arnold was a verbal agreement; there was no bond executed at the time to my knowledge. I do not know what further agreement might have taken place between Walworth and Arnold. The land, aside from the water power, was good land, well timbered and well watered. I consider the claim worth a good deal more than I got for it, principally on account of the water power.

Re-examination by defendant's counsel.

At the time I made the claim, and in January, 1838, the land in that vicinity was not generally claimed. There was land in the vicinity at the time, not claimed, that was equally well watered and timbered, and as productive. I have been in attendance as a witness, in obedience to a subpœna, two days, and have travelled thirty miles to attend as a witness.

RUSSEL FRISBIE.

Subscribed and sworn to before me, this 1st day of March, A. D. 1849.

JAMES HOLLIDAY,
Judge of probate.

STATE OF WISCONSIN,
Milwaukee county, ss:

Certificate.

I, James Holliday, judge of probate, in and for said county, do hereby certify, that the above named witness, Russel Frisbie, came before me on the first day of March, 1849, and the parties in the above entitled cause being present by their attorneys, Thomas L. Ogden, on the part of the complainant, and Jason Downer, on the part of the defendants; and the said witness, Russel Frisbie, being first duly sworn before me, to testify the truth, the whole truth, and nothing but the truth, and being examined by the attorneys of the parties respectively, did testify and depose as above. I further certify, that said deposition was reduced to writing by me, and after being so reduced to writing, was carefully read by me to the said witness, Russel Frisbie, and by him then subscribed and sworn to.

I further certify, that the exhibits accompanying this deposition, and marked A, B, C, and D, were shown to said witness, Russel Frisbie, at the time of his examination, and made exhibits as above.

JAMES HOLLIDAY,
Judge of probate.

MILWAUKEE, *March 1st*, 1849.

Fees for taking deposition, $2 87½.

Exhibit A.

Exhibit A—Frisbie to Walworth—Quit claim.

This indenture, made this twenty-third day of January, in the year of our Lord one thousand eight hundred and thirty-eight, between Russel Frisbie, of Milwaukee, of the first part, and Clinton Walworth, of the same place, of the second part, witnesseth: That the said first party, in consideration of one dollar to him in hand paid, hath, and hereby doth, forever quit claim, bargain, and sell, unto said second party, his heirs and assigns, all right, title, and interest, in and to the equal undivided half of the south half of section (35,) thirty-five, in township No. (8,) eight, of range No. (17,) seventeen east; and said first party warrants and defends against himself, his heirs, and assigns, and all or any other person, claiming by, through, or under him, them, or any of them. To have and to hold the said premises to the said second party, his heirs, and assigns, forever.

Witness my hand and seal the day and year above written.

RUSSEL FRISBIE. [L. S.]

In presence of—
J. A. GLADDING,
JOHN J. ANGEL.

TERRITORY OF WISCONSIN,
Milwaukee county, ss.

On the day of October, A. D. 1838, personally came before me, J. A. Gladding, to me known, who being duly sworn on oath saith, that Russel Frisbie, to him known to be the person described in, and who executed the within deed, executed the same freely in his presence; that he subscribed his name thereto as a witness of such execution, and resides in the town of Milwaukee.

Frisbie to Walworth. Quit claim.

Exhibit B.

Know all men by these presents, that I, Russel Frisbie, of the county of Milwaukee, and Territory of Wisconsin, in consideration of five hundred dollars to me paid by Clinton Walworth, of the town of Milwaukee, the receipt whereof I do hereby acknowledge, do hereby give, grant, sell, and quit claim, unto the said Clinton Walworth, his heirs, and assigns, all my right, title, interest, claim, and demand in and to the south half of section No. thirty-five, (35,) in township No. eight, (8,) north, of range No. seventeen (17) east. By this deed is intended to be conveyed one half of said south half, having previously conveyed to said Walworth the other half of the same. To have and to hold the afore[said] granted premises, with the privileges and appurtenances thereunto belonging, to the said Walworth, his heirs, and assigns, to his use and behoof forever. And he, the said Frisbie,

do hereby, for himself, heirs, executors, and administrators, covenant with the said Walworth, his heirs and assigns, that he will, and his heirs, executors, and administrators shall, warrant and defend the same to the said Walworth, his heirs and assigns forever, against the lawful claims and demands of all persons claiming by or under him, them, or any of them.

In witness whereof the said Russel Frisbie hath hereunto set his hand and seal, this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and thirty-eight.

RUSSEL FRISBIE. [L. S.]

Signed, sealed, and delivered in presence of—
F. A. WINGFIELD,
J. E. ARNOLD.

TERRITORY OF WISCONSIN,
Milwaukee county, ss.

On this day of , A. D. 1838, personally came before me Jonathan E. Arnold, to me known, and being duly sworn on oath saith, that Russel Frisbie, to him known to be the person described in, and who executed the within deed, executed the same freely in his presence; that he subscribed his name thereto at the same time as a witness of such execution, and resides in the town of Milwaukee.

Frisbie to Walworth. Bond.

Exhibit C.

Know all men by these presents, that I, Russel Frisbie, of the county of Milwaukee, and Territory of Wisconsin, am held and firmly bound unto Clinton Walworth, esq., of the county of Milwaukee, and Territory of Wisconsin, in the penal sum of one thousand dollars, lawful money of the United States, to be paid to the said Walworth, or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, and every of them, by these presents.

Witness my hand and seal, this 24th day of March, A. D. 1838.

The condition of the above obligation is such, that whereas the above bounden Russel Frisbie has this day sold to the said Walworth the following piece or parcel of land, commonly called a claim, to wit, the south half of section thirty-five, in township No. eight north, of range No. seventeen (17) east. Now, therefore, if the said Frisbie has not previously disposed of the said claim to any other person or persons, and has good right to sell the equal undivided half of the same, having previously conveyed the other half to said Walworth, and if there is no adverse claim; in other words, if he is the rightful claimant, and has in no wise done any act, matter, or thing to impeach his said right, by sale or otherwise; and also, if he shall, in case of pre-emption, suffer the said Walworth to prove the same up by rea-

son of the improvements and labor done by the said Frisbie on said claim, and shall, at the expense of said Walworth, furnish all the necessary evidence and information he is master of, to enable him so to prove up the same, and shall in nowise molest the said Walworth in his enjoyment of the same, by reason of any such improvements so made by him, the said Frisbie, then this obligation to be null and void, otherwise to remain in full force and virtue.

RUSSEL FRISBIE. [L. S.]

In presence of—
F. A. WINGFIELD,
J. E. ARNOLD.

Agreement.

Exhibit D.

It is understood, and hereby agreed, that Russel Frisbie, who has this day sold as his claim, to wit, the south half of section 35, of township 8 north, range 17 east, may occupy the same until November 1st, 1838, upon condition that he shall cut 200 rails for every acre he shall cultivate, and he will cultivate at least one acre, and shall in the mean time commit no waste on the same; and at the end of that term shall give up the possession immediately. In the mean time we reserve the right to put such improvements on it as we shall see fit, but not so as to interfere with said Frisbie's right of cultivation.

C. WALWORTH,
RUSSEL FRISBIE.

March 24th, 1838.

Order to take testimony.

In circuit court for the county of Milwaukee, State of Wisconsin.

JAMES KNEELAND and Hannah M. Kneeland, his wife, Frances Cornelia Foster, by her next friend, James Kneeland, and William G. Foster, by his next friend, James Kneeland,
vs.
CLINTON WALWORTH and Phœbe Walworth, his wife, George Reed, and Augustus Story.
} In chancery.

On motion of J. Downer, solicitor for defendant, Clinton Walworth and Phœbe, his wife, it is ordered by the court that testimony in this cause be taken by either complainants or defendants, or any of them, before Mr. Tenny, court commissioner for this county, at any time on five days' notice to the opposite party, or his or their solicitors; testimony to be closed on or before the first day of the next February term of this court. December 12th, 1849.

Time to take testimony extended.

In circuit court for the county of Milwaukee, State of Wisconsin.

JAMES KNEELAND and Hannah M. Kneeland, his wife, Frances Cornelia Foster, by her next friend, James Kneeland, and William G. Foster, by his next friend, James Kneeland,
vs.
CLINTON WALWORTH and Phœbe Walworth, his wife, and others.
} In chancery.

On motion of J. Downer, solicitor for defendant, Clinton Walworth, it is ordered, that the order herein before entered in this cause to close testimony be, and the same hereby is, opened, and that either party may take testimony in this cause at any time previous to the 3d day of May next, on giving notice to the other party, before Mr. Tenny, court commissioner for said county, or in any other way according to law. Testimony in said cause to be closed by the 3d Monday of May next.

March 5, 1850.

Stipulation to take testimony.

In circuit court for the county of Milwaukee, State of Wisconsin.

JAMES KNEELAND and others
vs.
CLINTON WALWORTH and others.
} In chancery.

It is stipulated and agreed that the deposition of Jonathan E. Arnold may be taken before Mr. Tenny, court commissioner, on the 9th day of February, 1850, at 7½ o'clock, p. m., at the office of said commissioner, to be read as evidence at the hearing of the above entitled cause on the part of the defendant, Clinton Walworth.

J. DOWNER,
Solicitor for Walworth.
THOMAS L. OGDEN,
Solicitor for complainants.

Deposition of I. A. Lapham.

MILWAUKEE CIRCUIT COURT.

JAMES KNEELAND and Hannah M. Kneeland, his wife, Frances Cornelia Foster, by her next friend, James Kneeland, and Wm. G. Foster, by his next friend, James Kneeland,
vs.
CLINTON WALWORTH and Phœbe Walworth, his wife, George Reed, and Augustus Story.
} In chancery.

Depositions of witnesses on the part of defendant, Clinton Walworth, taken before H. W. Tenny, court commissioner, on the 27th April, 1850, in pursuance of notice.

Increase A. Lapham, being duly affirmed, deposes and says as follows, to wit:

I have been a resident in this State since the first of July, 1836; at that time, and for the succeeding three or four years, $1 25 per acre was called the government price of land; and when the "government price" of land was spoken of, that was what was meant. There was an organization got up among the settlers on the public lands to protect and secure each other in their claims, which embraced Milwaukee, Washington, Waukesha, Jefferson, Dodge counties; the land which is now embraced in said counties. This organization was formed on the 13th day of March, 1837, and continued in active operation up to the time of the public sale of the public lands in March, 1839. As to lands not then sold, it was continued afterwards. I held the office of register of claims in that association. The paper hereto attached, marked exhibit (A,) is a full and true copy of the rules and regulations of that association. The effect of these rules and regulations, and the proceedings of the association, was to enable claimants to purchase the public lands at the minimum government price at the public sales, or afterwards. It did away with competition in bidding almost entirely. There were regular tribunals established by this association to hear and determine all matters relative to the public lands and the rights of settlers, as provided in the bye-laws, and their decisions were generally regarded.

I. A. LAPHAM.

Subscribed and affirmed to before me, this 30th day of April, 1850.

H. W. TENNEY,
Court commissioner, Wisconsin.

Certificate.

STATE OF WISCONSIN,
Milwaukee county, ss.

I, H. W. Tenney, court commissioner in and for said county, do hereby certify, that the above deposition of I. A. Lapham was taken before me, at my office, in the city of Milwaukee, on the 27th day of April, 1850, at 2 o'clock in the afternoon; that it was taken at the request of the defendant, Clinton Walworth, upon verbal interrogatories; that it was reduced to writing by myself; that it was taken to be used in the suit of James Kneeland and Hannah M. Kneeland, his wife, Frances Cornelia Foster, by her next friend, James Kneeland, and Wm. G. Foster, by his next friend, James Kneeland, complainants, vs. Clinton Walworth and Phebe Walworth, his wife, George Reed, and Augustus Story, defendants, now pending in the circuit

court of Milwaukee county; that both parties, by their counsel, attended at the taking of said deposition; that said deponent, before examination, was sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause; and that said deposition was afterwards, on the 30th day of April, 1850, carefully read to said deponent, and then subscribed and sworn to by him.

H. W. TENNEY,
Court commissioner.

Exhibit A.—Letters, rules, and regulations.

Rules and regulations adopted by the actual settlers in Milwaukie county, convened at the court house, March 13th, 1837.

At a meeting of the citizens of Milwaukee county, and of the counties of Washington, Jefferson, and Dodge, which are attached to Milwaukee, held in pursuance of public notice at the court-house in Milwaukee, on the 13th day of March, 1837, for the purpose of adopting such rules as will secure to actual settlers their claims, on principles of equity and justice, the following persons were appointed officers of the meeting:

Samuel Hinman, president; Samuel Sanbourn, Sylvester Pettibone, vice presidents; A. O. F. Breed, I. A. Lapham, secretaries.

The object of the meeting having been stated, and the rules adopted at a former meeting having been read, on motion, a committee of twenty-one members was appointed by the meeting to report a code of rules for the consideration of this meeting; whereupon the following persons were appointed on said committee:

Byron Kilbourn,	Solomon Juman,
Alfred Morgan,	John W. Rockwell,
Alfred Orendorff,	John Howard,
Henry Shew,	Dwight Foster,
Luther Parker,	Thos. H. Olin,
Charles Everett,	Alva Harrington,
Enoch Chase,	Nicholas Whalen,
N. F. Hyer,	James Sanderson,
John Manderville,	Jeremiah Putney,
Robert Masters,	A. L. Barber,

Alna Harrington.

Mr. Kilborn, as chairman of said committee, reported to the meeting, after a recess of two hours, the following preamble, rules, and regulations, which were considered severally and adopted:

Whereas the settlers of Milwaukee county, including the several counties thereto attached, have removed to, and settled in, this section of the country for the purpose of bettering their condition by agricultural pursuits, the inducements and encouragements for which being here so liberally extended to us, not only in the rich reward obtained in the abundant product of our fertile soil, but also in the liberal price

which those products command; and whereas the Congress of the United States, by the repeated passage of pre-emption laws, impressed us with a reasonable belief that the same policy would continue to be pursued for the benefit of those settlers on the public lands who, by their recent settlement, could not be included under the provisions of the last pre-emption law; and whereas the settlements in this section of the country have been in great part so recently formed, that a pre-emption law, containing such provisions as that reported during the late session of Congress, would not embrace the case of a large number of meritorious settlers, but would leave their improvements subject to entry by those who may hereafter visit the country with a view to purchase land; and whereas, under all the circumstances, the people of the county could not witness without emotion the sacrifice of property and improvements, the product of their own labors, together with their fondly cherished hopes in the future enjoyment of their newly formed homes; and whereas, in order to secure the profits of their labors in a peaceable and equitable manner, it is necessary that certain fixed rules and regulations should be adopted by the settlers, whereby the right of occupancy shall be determined; therefore, be it resolved by the people of Milwaukee county, as at present organized, in general meeting assembled, that they do now adopt, and will to the best of their abilities sustain, in full force of obligation, the following rules and regulations:

R. 1st. Any person who has prior to this date made a claim on one or more quarter sections, not exceeding in the whole one section of land, and made improvements thereon equal to fifty dollars in amount for each quarter section, shall have the right to retain said claims in possession on a compliance with the conditions contained in the rules adopted by this meeting.

R. 2d. Any person who is competent to enter land at the land office shall be entitled to make claim, and hold in his or her own right, any quantity of land not exceeding in all one section, by complying with the following conditions, viz:

Con. 1st. If a person claim one quarter only, he shall improve and cultivate, within six months from the time of entering such claim, at least three acres, and, within one year from making said entry shall erect and finish a house thereon, suitable for the residence of a family; or, instead of building a house, to improve and cultivate three acres in addition.

Con. 2d. If a person claim two quarter sections, he shall improve and cultivate, within six months from the time of entering such claim, at least ten acres, and within one year from making said entry, shall erect and finish a house thereon suitable for the residence of a family; or, instead of building a house, to improve and cultivate five acres in addition.

Con. 3d. If a person claim more than two quarter sections, he shall improve and cultivate, within six months from the time of entering such claim, at least fifteen acres, and shall, moreover, improve and culti-

vate, within one year from making said entry, an additional amount of land, which will make the whole improvement equal to one-tenth part of the whole amount of land claimed; and also erect on said land a house, and finish the same suitable for the residence of a family, within said term of one year.

Con. 3d. The following being considered proper definitions as to what constitutes an improvement and cultivation, are therefore adopted as a rule of judgment, viz :

Def. 1st. If the claim lie in wood land, to clear off all down timber and brush, and all trees of ten inches in diameter and under; and enclose the requisite quantity of land with a good fence, such as a farmer would build to protect his crops; and sow or plant the same with grass, grain, or vegetables, shall be deemed a sufficient improvement and cultivation.

Def. 2d. If the claim lie in a prairie, or part prairie and part wood land, then to enclose the proper quantity with a fence, and plough the prairie, and put in a crop as aforesaid, or plant in part, and mow or make hay in part of said field, shall also be deemed a sufficient improvement and cultivation.

Def. 3d. In case the time allowed for improvement and cultivation shall fall in that season of the year when ploughing and planting cannot be done, then the making of an improvement, agreeably to the foregoing requirements, within the time limited, and the sowing and planting being performed at the ensuing seed time, shall be deemed an improvement and cultivation within the meaning of these rules.

R. 4th. All claims made in the name of any person who is not an inhabitant of this country, shall be forfeited, unless the person in whose name they are made shall take actual possession of them before the first day of June next, and commence making improvements thereon according to the regulations this day adopted. And any claim which is now regularly made, but not entered on the record, and which shall remain unentered until the first day of May next, shall be considered as no claim, and may be occupied by any person who may choose to take it.

R. 5th. No person shall make a claim on any tract which has been taken and regularly entered by any other person, (whereon fifty dollars' worth of work has been done,) unless such person shall neglect to make such improvements as are prescribed by these rules, within the time limited therefor; but in case any claimant shall neglect to improve in the time and manner by these rules set forth, he shall forfeit his right to said claim, and any person may take possession thereof in his own right.

R. 6th. In order that all may know what lands are claimed, and what are not, it shall be necessary for every person who makes a claim to enter the same, within ten days thereafter, with the register, who shall perform the duties of his office without any charge; and all claims which shall not be so entered, shall be considered vacant, and subject to be entered by any person who may choose.

R. 7th. In order that the committee may be able to present a true list of all claimants on the day of sale, whereby each person will be secured his just rights, it is required that, when any person shall purchase a claim from another, he shall immediately give the register notice thereof, and have the transfer made in his name.

R. 8th. No person shall hold, by purchase or otherwise, more than four quarter sections of land; and in case any person shall have taken up, or purchased, to the amount of four quarters, and shall have sold any or all of them to other persons, he shall thereafter be incapable of holding any further or other claim in this county. This provision not to apply to any sales which have been made prior to this time, but to future operations, after the adoption of these rules and regulations.

R. 9th. Whenever the lands in this county shall be brought into market, the executive committee shall appoint an agent to bid off the lands in behalf of the settlers whose claims are entered on the book of registry; and no person shall, in any case, be countenanced in bidding in opposition to such agent on behalf of the settlers.

R. 10th. In any case when a person shall claim more than a quarter section, lying contiguous and adjoining to each other, the amount of improvement required for all of them may be done on any one or more of said quarters, as may suit the convenience of the claimant; but in case the several quarters claimed shall be in separate and disconnected tracts, the greater part of the improvements made to secure the whole may be made on any tract which the claimant may prefer; provided that at least three acres shall be improved and cultivated on each of the other quarter sections, within the time of six months.

R. 11th. There shall be a central executive committee appointed at Milwaukee by this meeting, consisting of fifteen members, whose duty it shall be to fix the limits of the different precincts, the people of which to appoint a judicial committee in each precinct, consisting of three or five members, as they may deem best. The central executive committee shall also appoint a register of claims, and a clerk of their own board, who shall keep a minute of their proceedings; and to appoint such other officers as the interests of the settlers may require, and call meetings of the people, when they may think it necessary for the general interest, or for the purpose of amending these rules, or for other purposes. Eight or more members of said committee shall form a quorum for the transaction of business, and a vote of a majority of the members present at any meeting shall decide any question before them; questions on appeals included. They shall have power also to fill vacancies in their own board.

R. 12th. All disputes that may arise between different claimants to the same parcel or tract of land shall be submitted to the arbitration and decision of the judicial committee within and for the precinct in which the said disputed tract shall lie; and either party feeling aggrieved by any decision that may be made by the judicial committee as aforesaid, shall have the right of appealing therefrom to the executive com-

mittee, who shall constitute a board for the trial of appeals; and their decision shall be final and conclusive between the parties: Provided, that no appeal shall in any case be taken from the decision of the judicial committee as aforesaid, unless the party appealing shall within twenty-four hours after the making and publishing of such decision pay, or cause to be paid, all costs that may have been awarded against him: And provided, also, that the executive committee, before proceeding to hear any question brought before them by appeal, shall require the parties to enter into bonds, each to the other, in sums as the executive committee shall think proper, conditioned to abide, do, and perform, in all respects, as said committee shall decide, order, or direct; and either party refusing so to give bonds, shall not be heard before said committee, but the matter in controversy shall be taken pro confesso against him, and a dicision entered accordingly.

R. 13th. When any claimant shall bring any question of settlement in relation to a disputed claim before the judicial committee, or shall have appealed from the decision of said committee, and wish a trial of the same before the executive committee, it shall be the duty of such claimant to give in writing at least six days' notice to the opposite party, (if a resident of this country,) of the time and place of the meeting of such committee; and neither of said committees shall proceed to hear any dispute, unless satisfactory evidence is produced of the service of notice aforesaid. But if it shall appear that notice has been given, and the opposite party does not appear, then they may proceed ex parte, or adjourn to some future period, not less than two or more than thirty-two days, as justice and the circumstances of each particular case shall require; and in all cases of adjournment, notice thereof shall be given to the absent party, if resident of this country as aforesaid.

R. 14th. In conducting all trials by either of said committees as aforesaid, and in making any and all decisions therein, said committee shall be governed strictly by the rules and regulations this day adopted, and by the principles of justice and equity; and the committee shall have power to adjudge such a sum to the party to whom the claim shall of right belong, as a remuneration for costs and charges in and upon said trial, as to them shall seem just and equitable.

R. 15th. It shall be the duty of the judicial committee in all cases not appealed from within twenty-four hours, and of the executive committee, immediately upon the making of any decision, to make out and deliver to the party in whose favor such decision shall be made, a certificate thereof; and such certificate shall be sufficient authority for the register to enter the tract of land therein described, in the name of such party, any previous entry or entries to the contrary notwithstanding; and such party shall thereupon be entitled to take possession of such tract without any further judicial proceeding.

R. 16th. These rules and regulations shall be and remain in force, until changed by the people in general meeting, convened by a call of the board of the executive committee, by a notice published at least twenty days previous to the day appointed for said meeting.

On motion, resolved, that A. A. Bird, Solomon Juneau, Samuel Brown, D. H. Richards, Samuel Hinman, H. M. Hubbard, C. H. Peak, N. F. Hyer, Albert Fowler, A. O. F. Breed, William R. Longstreet, James Sanderson, Daniel Wells, jr., Byron Kilbourn, and Enoch Chase, be and they are hereby appointed the central executive committee.

On motion, resolved, that all orders adopted by the central executive committee, effecting the general interests of the community, shall be published.

On motion, resolved, that the proceedings of this meeting, with the rules and regulations this day adopted, be signed by the president, vice president, and secretaries, and published in the Milwaukee Advertiser.

SAMUEL HINMAN, *President.*

SAMUEL SANBOURNE,
SYLVESTER PETTIBONE,
Vice Presidents.

A. O. F. BREED,
J. A. LAPHAM, *Secretaries.*

The executive committee on claims, appointed at a meeting of the people, at the court-house, in Milwaukee, on the 13th day of March, 1837, convened at the office of Byron Kilbourne, esq., on Tuesday, March 14th, 1837, for the purpose of organizing and entering on the discharge of their duties.

On motion, Samuel Hinman was appointed chairman, and Albert Fowler, clerk.

The following orders were submitted, and after discussion adopted:

Ordered, That the territory to be included under the rules and regulations entered into at the meeting on the 13th instant, shall be divided into ten precincts, bounded as hereinafter described, and known by the following names, to wit;

Washington precinct, the whole of Washington county.

Dodge precinct, the whole of Dodge county.

Jefferson precinct, the whole of Jefferson county.

Mequanigo precinct, ranges 17, 18, and 19, in town. 5.

Muskego precinct, ranges 20 and 21, in town. 5.

Oak Creek precinct, ranges 22 and 23, in town. 5.

Poplar Creek precinct, ranges 20 and 21, in town. 6.

Chase's Point precinct, range 22, in town. 6.

Menomenee precinct, ranges 20 and 21, in town. 7 and 8.

Prairie Village precinct, ranges 17, 18, and 19, in towns. 6, 7, and 8.

Ordered, That the election for a judicial committee in said precincts shall be holden on Monday, the 26th day of March, 1837, at the following places, the polls to be open at one o'clock, p. m., and to close at 4 o'clock, p. m.

Washington precinct, at S. McEvony's.

Jefferson precinct, at Thos. Brayton's.

Prairie Village precinct, at Mr. Walton's.

Mequonigo precinct, at Mr. Camp's.
Muskego precinct, at Mr. Thoma's.
Oak Creek precinct, at Mr. Higgin's.
Poplar Creek precinct, at O. Harrington's.
Chase's Point precinct, at H J. Hurd's.
Menominee precinct, at W. Woodward's.

Ordered, That the presiding officers at the meetings of the people in the several precincts, for the election of judicial committees, shall report to the clerk of the executive committee the names of the persons elected in the several precincts, which report shall be registered by said clerk.

Ordered, That the clerk of this board shall keep a fair record of all their proceedings, shall make out all bills of cost, shall require notice of appeals in vacation of the board, and notify the chairman thereof. The said clerk shall also issue such notices as shall be required by the board, and in general shall discharge the usual duties of clerk of a court of record.

Ordered, That this committee now proceed to appoint a president, two vice presidents, a clerk, and a register of claims; and on counting the votes, the following named persons were chosen to the offices affixed to their names respectively:

Augustus A. Bird, president; Byron Kilbourn, first vice president; Samuel Hinman, second vice president; William A. Prentiss, clerk; Allen O. T. Breed, register of claims.

Ordered, That it shall be the duty of the president, and in his absence of the vice presidents, to preside at all meetings of this committee, and when sitting for the purpose of deciding any appeals from either of the precinct committees, this board shall proceed according to the practice of courts of equity.

Ordered, That in all cases where a person shall have entered on a claim, and made valuable improvements thereon, which had been previously entered by some other person who had not made improvements to the amount of fifty dollars, prior to the 13th March, instant, agreeably to the rules then existing, the person so taking possession shall have the right of entering said claim with the register by producing a certificate of the committee of the precinct where such claim shall lie, stating such facts; provided that said certificate shall not be considered as adjudicating the case between the parties, unless the first claimant shall fail to present the case for the consideration of the committee of said precinct, by the first day of May next; but if said first claimant shall fail to so present the case, then the claim shall stand in the name of the person entering by sanction of said certificate.

Ordered, That the regular or stated meetings of this board shall be held on the first Monday of each month, and at such places as shall be hereafter determined.

On motion, the committee adjourned to the first Monday in April next, at 10 o'clock, a. m.

By order of the executive committee.

WM. A. PRENTISS, *Clerk.*

Proceedings of the central executive committee on claims.

At an adjourned meeting of the central executive committee on claims, holden at the office of W. A. Prentiss, in Milwaukee, April 10th, 1837, the following orders were submitted and adopted:

Ordered, That in all cases of appeal from the judicial committees, the parties shall appear before the clerk of the executive committee, before the first regular meeting of said committee shall thereafter be held, and enter into bonds agreeably to the 12th rule of the general regulations, in such sum as the said clerk may think is double the value of the land in controversy; and in case the party appealing shall fail to enter into bonds as aforesaid, the judgment of the judicial committeeshall be affirmed. But in case the party responding shall refuse to enter into bonds, the decision of the judicial committee shall be reversed. The party appealing shall execute the bond at the same time of filing the appeal, and the other party shall execute the same bond on his part before the meeting of the committee, as aforesaid; or if there are not six days intervening, then before the time of holding the next succeeding meeting.

Ordered, That all cases of appeal which shall be made six or more days before the time of the regular sittings of the executive committee, shall come on for trial before said committee at the first meeting after the making of said appeal, unless the committee shall adjourn the same to a future day; and should the party so appealing fail to appear and prosecute the same before the committee as aforesaid, or show good cause for non-appearance, the committee shall proceed to try the case ex parte, and shall make a decision according to what shall appear to them the merits of the case.

Ordered, That all cases of appeal taken within six days prior to any regular meeting shall come up for trial at the first meeting of the executive committee which shall be holden after the expiration of six days from the taking of said appeal; and should the party appealing not appear, the committee may proceed to try the case ex parte, and make decision according to what may appear the merits of the case.

Ordered, That Jefferson county be divided into three precincts, to be called the Watertown, Fort Atkinson, and Jefferson precincts.

Watertown precinct: Ranges 15 and 16, in towns. 7 and 8.

Jefferson precinct: Ranges 13 and 14, in towns. 7 and 8.

Fort Atkinson precinct: Ranges 13, 14, 15, and 16, in towns. 5 and 6; and that an election for judicial committees in each of the said precincts shall be holden on the first Monday of April, 1837, at the following places:

Jefferson precinct at Thos. Brayton's.
Watertown " Mr. Johnson's.
Fort Atkinson " Dwight Foster's.

I. A. Lapham was appointed register of claims to supply the vacancy occasioned by the resignation of Allan O. T. Breed.

The committee adjourned to meet at the office of Wm. A. Prentiss on the first Monday of May next, at 10 o'clock, a. m.

By order of the Central Executive Committee.

WM. A. PRENTISS, *Clerk.*

Proceedings of the Central Executive Committee on claims.

At a meeting of the Central Executive Committee on claims, holden at the office of Wm. A. Prentiss on Monday, May 1st, the following orders were submitted and adopted:

Ordered, That in all cases where any person shall apply for the registry of a claim under the 4th rule, which has been previously entered, he shall produce the certificate of a majority of the members of the judicial committee of the precinct in which the claim lies, stating that the person in whose name the claim was entered is not an inhabitant of this county, and did not take actual possession thereof before the first day of June, and commenced making improvements thereon according to the rules and regulations adopted by the settlers, March 13th, 1837. (The fourth rule is in the following words:)

Rule 4th. "All claims made in the name of any person who is not an inhabitant of this county shall be forfeited, unless the person in whose name they are made shall take actual possession of them before the first day of June next, and commence making improvements thereon according to the regulations this day adopted; and any claim which is now regularly made, but not entered on the record, and which shall remain unentered until the first day of May next, shall be considered as no claim, and may be occupied by any person who may choose to take it."

Ordered, That, in all cases of appeal to the executive committee, the depositions of witnesses living more than ten miles from Milwaukee shall be received as evidence, under the provisions and restrictions of the statute in such case made and provided, without regarding technicalities: Provided, sufficient notice be given to the adverse party of the time and place of taking such depositions.

Ordered, That in all cases where a person shall have entered on a claim since March 13th, 1837, and made valuable improvements thereon, which had been previously entered by some other person who had not made improvements to the amount of fifty dollars prior to said 13th of March, agreeably to the rules then existing, the person so taking possession shall be required to give six days' notice in writing to such person, if a resident of any precinct within the jurisdiction of the Central Executive Committee, of his intention to apply to the judicial committee of the precinct where such claim shall lie for a certificate stating such facts: Provided, that any certificate given as aforesaid shall not be considered as adjudicating the case between the parties, but shall only entitle the said claimant to have the claim registered in his name, unless the first claimant shall fail to present the case, for a hearing on the merits, before the committee of said precinct within thirty days from the granting of said certificate as aforesaid; but, if said first claimant shall so fail to present the case, then the claim shall stand in the name of the person entering by sanction of said certificate.

Ordered, That no person shall enter a claim for another without presenting the written certificate of the applicant, and the register shall

not make any transfer of claims entered on his books without a bill of sale by the party signed by him personally.

Ordered, That the election of judicial committees in the Watertown and Jefferson precincts, (if not heretofore made,) be holden on the 11th day of May, 1837, and such persons as are in favor of adopting the rules and regulations entered into by the settlers on the 13th March, 1837, may assemble at the house of V. Wood, in the Watertown precinct, and at the house of T. Brayton, in the Jefferson precinct, and elect judicial committees agreeably to the rules heretofore published.

The committee adjourned to meet at the office of William A. Prentiss on the first Monday of June, 1837, at 10 o'clock, a. m.

By order of the executive committee.

WILLIAM A. PRENTISS, *Clerk.*

A true copy from an original printed handbill in my possession.
Fees, $8 00. I. A. LAPHAM.

Deposition.

MILWAUKEE CIRCUIT COURT.

JAMES KNEELAND and Hannah M. Kneeland, his wife, Frances Cornelia Foster, by her next friend, James Kneeland, and William G. Foster, by his next friend, James Kneeland,
vs.
CLINTON WALWORTH and Phœbe Walworth, his wife, George Reed, and Augustus Story.
} In chancery.

Deposition of J. E. Arnold.

Depositions of witnesses on the part of the defendants in the above entitled suit, taken before H. W. Tenney, court commissioner, on the 9th of February, A. D. 1850, in pursuance of stipulation.

Jonathan E. Arnold being duly sworn, deposes and says as follows, to wit:

On the 26th of March, A. D. 1838, Clinton Walworth executed to me a bond in the sum of $1,000, conditioned that the said Walworth should, as soon as possible, by pre-emption, at public sale, by private entry or otherwise, purchase or cause to be purchased at government price, and at his own cost and expense, the south half of section thirty-five, in township eight, of range seventeen, and immediately convey or cause to be conveyed to me, my heirs, or assigns, the equal undivided half part of the same by a good and sufficient deed of warranty, free of all encumbrances; and should as soon as possible purchase from Government the following described quarter section of land, (then claimed by the said Walworth on the books of the register of claims,) to wit, a true copy of which said bond, as I believe, is hereto annexed, marked "A." The original bond I as-

signed to Gustavus A. Foster for the consideration of $350, on or about the 20th of November, 1846. On or about the 26th day of March, 1838, Russel Frisbie proposed to sell to me the premises mentioned in the bond above described. He had previously sold the other half to Clinton Walworth, and had a bond from Walworth to purchase said lands, and to convey the one-half to him, free from all expense to said Frisbie, as I believe, except as stated in the bond to me. At the time of making the purchase of Frisbie, which I did on or about the 26th of March, 1838, Frisbie surrendered his bond to Walworth, and I, stepping into Frisbie's shoes, took a bond from Walworth, which is the bond above described; and for this I paid Frisbie the sum of $400. When the bargain was made between Frisbie and me, Mr. Walworth was present, and fully understood the arrangement, which was, that I was to take Frisbie's place in the bargain between Frisbie and him; and Walworth's bond to me was executed to carry out that arrangement, Frisbie assenting thereto, and surrendering up to Walworth his (Walworth's) bond to him (Frisbie.) I closed up the transaction with Frisbie on the day it was made, but it is possible there may have been a delay of a day or two in the execution of the papers from Walworth to me. This land was then public land of the United States, and not yet brought into market. It was at that time held by Frisbie as a claim.

Cross examination.

There were no other conditions in the arrangement between Frisbie, Walworth, and me, at the time of this transaction, other than what was expressed in the bond to be performed on my part. At the time of my purchase from Frisbie, the premises were not in market, and no pre-emption law had been passed by the United States. With a view to obtain the same, I felt equally interested with Mr. Walworth to have such improvements made as should enable us to hold the lands as claims, and to obtain the benefit of any pre-emption law that might be passed; and with a view to protect myself, and to join with Mr. Walworth in improving the premises, contracted jointly with Mr. Walworth for a quantity of rails, for the purpose of fencing a portion of the same, and paid my half of the amount.

I went with Mr. Walworth to examine the premises on or about the 30th day of April, 1838, and the contract above mentioned, for the rails, was made about the same time. These improvements were designed both with reference to holding it as claims, and with reference to any pre-emption laws that might be passed. The premises in question were deemed by us mainly valuable, at the time, on account of the water power which we thought could be improved to great advantage on the same. Some time, I think about a year afterwards, I proposed to Mr. Walworth to construct a dam across the river on said premises, which proposition he did not assent to.

Direct resumed.

By the word "claim" I mean a claim to real estate, on lands of the

United States, in pursuance of certain claim rules and regulations then existing, and in force among the settlers upon the public lands of the United States, in the Milwaukee land district, for a more particular description of which I refer to the printed rules and regulations then existing, and the register's claim book kept by I. A. Lapham. That organization consisted of a central committee, being the supreme court of appeal in claim cases, and of subordinate tribunals, consisting of local committees in different neighborhoods or precincts. By those rules and regulations, a man could claim a certain portion of Government lands, and hold the same as his claim, upon making certain improvements, within a specified time, upon having his claim registered in the book of registry, kept by Mr. Lapham. And if he failed to make such improvements, any other person could "jump" his claim, and upon showing to the local committee a failure to make the requisite improvements, could get from said committee a certificate allowing the claim to him, and upon presenting the same to the register, Mr. Lapham, could have said claim transferred to him upon the records. The object of this organization was to protect the settlers in each other's claims, and to enable them to purchase their land from the United States, without competition from other persons, as I believe.

After Mr. Walworth had purchased the southeast quarter of said section 35, I had several interviews with him in relation to a settlement of his said bond to me, in which he proposed [this last testimony is called out by complainant, and objected to by defendant Walworth] to convey to me the said quarter section, in discharge of said bond, provided I would pay the additional price of one dollar and a quarter an acre. After the date of the bond, said section 35 became canal lands, and Walworth had purchased it at $2 50 per acre, and paid 10 per cent. thereon.

J. E. ARNOLD.

Subscribed and sworn to before me, this 9th day of February, A. D. 1850.

H. W. TENNEY.
Court comr., Mil. co., Wis.

Certificate.

STATE OF WISCONSIN,
Milwaukee county, ss.

I, H. W. Tenney, court commissioner, in and for said county, do hereby certify, that the above deposition of J. E. Arnold was taken before me at my office in the city of Milwaukee, on the 9th day of February, A. D. 1850. That it was taken at the request of the defendant, upon verbal interrogatories; that it was reduced to writing by myself; that it was taken to be used in the suit of James Kneeland and Hannah M. Kneeland, his wife, Frances Cornelia Foster, by her next friend, James Kneeland, and William G. Foster, by his next friend, James Kneeland, vs. Clinton Walworth and Phœbe Walworth, his wife, George Reed and Augustus Story, now pending in the circuit court of Mil-

waukee county ; that said deposition was taken in pursuance of stipulation between said parties; that both parties attended at the taking of said deposition; complainants by their solicitor T. L. Ogden, and defendants by their solicitor Jason Downer; that said deponent, upon examination, was sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause, and that said deposition was carefully read over to said deponent, and then sworn to and subscribed by him.

W. H. TENNY,
Court comr., Mil. co., Wis.

Dated February 11, A. D. 1850.

Fees, 16 folio,	$2 00
Subpœna,	25
Swearing witness,	12
	$2 37

Walworth to J. E. Arnold—bond.

Copy.

Know all men by these present, that I, Clinton Walworth, of Milwaukee, counsellor at law, am held and firmly bound unto Jonathan E. Arnold, of said Milwaukee, in the sum of one thousand dollars, to be paid to the said Arnold, his executors, administrator, and assigns; to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated at Milwaukee, this 26th day of March, A. D. 1838.

The condition of this obligation is such, that if the above bounden Clinton Walworth shall and do, as soon as possible, by pre-emption, at public sale, by private entry, or otherwise, purchase, or cause to be purchased, at government price, and at his own cost and expense, the following described tract of land, situate in the county of Milwaukee, to wit: The south half of section thirty-five, (35,) town. eight, (8,) range seventeen, (17,) and immediately convey, or cause to be conveyed, to the said Arnold, his heirs or assigns, the equal undivided half part of the same, by a good and sufficient deed of warranty, free of all encumbrances, and shall and do, as soon as possible, purchase from Government the following described quarter section of land, (now claimed by the said Walworth on the books of the register of claims,) to wit:

And immediately convey an undivided half of the same to the said Arnold, his heirs or assigns, provided the said Arnold, his heirs or assigns, shall furnish to the said Walworth one half of the said money necessary to purchase said quarter section, to wit, the sum of one hundred dollars, this obligation shall be null and void, otherwise shall remain in full force and virtue.

CLINTON WALWORTH. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN S. ROCKWELL.

Assigned to Foster by deed, Nov. 20, 1846.

Stipulation.

In circuit court of the county of Milwaukie, State of Wisconsin.

JAMES KNEELAND and others, heirs of Gustavus A. Foster, deceased, vs. CLINTON WALWORTH and others. } In chancery.

It is stipulated and agreed, by and between the parties to this suit, that it is hereby and shall be admitted as evidence in this suit, that the land described in the bill in this cause is part of the lands given or granted by the United States to the Territory of Wisconsin, by an act of Congress, approved June 18th, 1838, entitled "an act to grant a quantity of land to the Territory of Wisconsin, for the purpose of aiding in opening a canal to connect the waters of Lake Michigan with those of Rock river; and that the quarter section [of] land alleged in the pleadings to have been purchased by the defendant, was purchased by him from the Territory of Wisconsin.

J. DOWNER,
Defendant Walworth's solicitor.
HOLLIDAY, BROWN & OGDEN,
Complainants' solicitors.

Walworth to Arnold—Bond.

Know all men that I, Clinton Walworth, of Milwaukee, counsellor at law, am held and firmly bound to Jonathan E. Arnold, of said Milwaukee, in the sum of one thousand dollars, to be paid to said Arnold, his executors, administrators, and assigns; to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated at Milwaukee, this 26th day of March, A. D. 1838.

The condition of this obligation is such, that if the above bound Clinton Walworth shall and do, as soon as possible, by pre-emption, at public sale, by private entry, or otherwise, at government price, and at his own cost and expense, purchase, or cause to be purchased, the following described tract of land, situate in the county of Milwaukie, to wit, the south half of section (35) thirty-five, town. eight (8,) range seventeen (17,) and immediately convey, or cause to be conveyed, to the said Arnold, his heirs, or assigns, the equal undivided half part of the same, by good and sufficient deed of warranty, free of all encumbrance, and shall and do, as soon as possible, purchase from Government the following described quarter section of land, (now claimed by said Walworth, on the books of the register of claims,) to wit:
and immediately convey one undivided half of the same to said Arnold, his heirs, or assigns: Provided, the said Arnold, his heirs, or assigns, shall furnish to said Walworth one half the sum of money necessary to purchase said quarter section, to wit, the sum of one hun-

dred dollars, then this obligation shall be null and void, otherwise shall remain in full force and virtue.

CLINTON WALWORTH. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN S. ROCKWELL.

Arnold to Foster—Assignment.

Know all men by these presents, that I, Jonathan E. Arnold, the obligee named in the foregoing bond, for and in consideration of three hundred and fifty dollars, to me paid by Gustavus A. Foster, the receipt of which is hereby acknowledged, do hereby bargain, sell, assign, transfer, and set over, to the said Foster, the foregoing bond, together with all my right, title, and interest, in and to the same, and in and to the premises therein mentioned; to have and to hold the same to the said , his heirs, executors, administrators, and assigns, forever.

Witness my hand and seal this 20th day of November, A. D. 1846.

J. E. ARNOLD. [L. S.]

In presence of—

Opinion.

Milwaukee circuit court.

JAMES KNEELAND, admr. of Gustavus A. Foster,
vs.
CLINTON WALWORTH, Phœbe A. Walworth, George Reed, and Augustus Story. } In chancery.

The bill in this case is filed to procure the specific performance of the condition of a bond executed on the 26th day of March, 1838, by Clinton Walworth, one of the defendants, to Jonathan E. Arnold. Arnold assigned and conveyed his interest in the bond, and in the premises mentioned therein, some time in 1846, to Gustavus A. Foster, who filed the bill; subsequently Foster died, and the suit was revived and is prosecuted by James Kneeland, as administrator.

I have had strong doubts of the propriety of equitable interference in this case at all. The older practice of sending the complainant to his remedy at law on the bond would seem to be the proper course; and I am induced to retain the case only from the consideration that the complainant is in possession of the premises described in the condition of the bond, and there may be difficulty in affording him complete redress in damages.

As I understand the condition of the bond, both from its terms and from the testimony, Walworth undertook, at his own expense, to procure the title to the south half of section 35, in town. 8, range 17, in the Milwaukee land district, provided the same could be purchased at ten shillings per acre, and to convey to Arnold an undivided half of the same, free of all encumbrance; also to purchase, in case Arnold should furnish him with one hundred dollars for the purpose, the north-

east quarter of section 36, in the same township and range, and to convey one-half thereof to Arnold unencumbered. The answer alleges that Arnold did not furnish this sum of money, or any part of it, and that, in consequence, the land last mentioned, was not purchased. On this point the answer, in the absence of proofs, must be conclusive; and that disposes of the second branch of the condition of the bond.

The answer further alleges, that after the execution of the bond, and on the 18th of June, 1838, the Government of the United States granted a tract of land, including all of the lands in question, to the Territory of Wisconsin, and fixed the minimum selling price thereof at two dollars and a half per acre. I deem this part of the answer responsive to the bill, and therefore evidence for the defendant. But, if it were not so, it is doubtless a fact of which this court should take notice, being contained in a public law of the United States. If the answer had set up this fact as a reason why no part of the condition of the bond had been fulfilled, it would probably have been conclusive against the complainant. But it is admitted that the defendant, Walworth, on the 3d day of July, 1839, did purchase of the Territory of Wisconsin the southeast quarter of said section 35, being one-half of the premises mentioned in the first branch of the condition of the bond; and it is averred in the answer, and not denied, that he paid, or became obligated to pay therefor, the price of two dollars and a half per acre.

The complainant, by his bill, asks that the defendant, Walworth, may be decreed to convey to him the whole of this quarter section unencumbered, in fulfilment of the condition of the bond. It is true that this is the exact number of acres to which he would have been entitled in case of the fulfilment of the first branch of the condition of the bond. But this court must do complete justice between the parties, and for that purpose must look into the whole facts in the case. It appears that there was not, and could not be, a complete compliance with this branch of the condition. By reason of a change in the government price of the lands, Walworth became unable to purchase, as was contemplated by the parties, at ten shillings per acre. He was compelled to pay four hundred dollars for the quarter section, which was the same sum it was stipulated he should pay for the half section. And, by the terms of the bond, Walworth was to retain one-half of the premises to be purchased, and to convey the other half to the obligee. If it be proper, therefore, to treat the purchase actually made by Walworth as a fulfilment pro tanto of the condition of the bond, it is proper to look at the fact that he has paid all the money he agreed to pay, and that the quarter section, and not the half section, is the proper representative of it. In getting at the substance of this agreement, I think it proper to look at the amount of money to be paid, rather than at the quantity of land to be obtained, as the measure of Walworth's undertaking. And as he was to have half the product of the purchase money, it cannot be equitable to require him to convey the whole of the land purchased to the complainant.

The main difficulty in my mind has been to determine that the

purchase made by him was a part fulfilment of the trust. But, in view of all the circumstances of the case, I am inclined to the opinion that it ought to be so regarded. For a sufficient legal consideration, Walworth undertook to purchase a given quantity of land at a given price, in other words, for a given sum, and to convey one-half thereof to Arnold. For that sum he did purchase one-half, instead of the whole, of the specified tract, but has not conveyed. The title must be regarded as taken and held in trust. The complainant, as the representative, assignee, or grantee of Arnold, stands in his place, and must be substituted in equity as to all his rights. He is entitled to a conveyance of an undivided half of the quarter section. And this right will cut off all encumbrances made or suffered by Walworth, except the mortgage to the Territory, and conveyance to bona fide purchasers without notice. Neither the defendant, Phœbe A. Walworth, the wife of Clinton Walworth, nor the defendants Reed and Story, who are represented as judgment creditors of Walworth, have any rights in the premises as against the complainant.

Decree.

The decree of this court must be, that Walworth convey an undivided half of the premises to the complainant, freed from the mortgage to the Territory, and that the other defendants be barred and restrained from asserting or enforcing any right or claim to such half.

This disposes of the material questions in the case, as I regard it. But there were several other points made by counsel, upon which it may be proper to express an opinion.

First. It was contended by the defendants' counsel that the whole condition of the bond ought to have been set forth in the bill; that this condition constituted one entire contract; and if the blank as to the description of one lot was to be filled after an ascertainment of the facts, then there had been no execution and delivery of the contract. I think that part of the instrument would have been merely void, merely blank paper, in case there was not enough stated to enable this court to ascertain by proofs what lot was intended. But I was inclined to think the description was sufficient to authorize the court, by proofs aliunde, to identify the premises. And in this view of it I should have held it necessary for the plaintiff to set out this part of the condition of the bond, in order to enable him to maintain his suit, had it not appeared by the answer that the price of the land had been doubled, and that the defendant claimed, as I thought, properly, to be exempted by that circumstance from all obligation to fulfil his part of the bond. If he was released from his liability to purchase on that ground, Arnold was released, likewise, from liability to furnish his part of the money. But there is another difficulty. The land or lot, in respect to which the blank is left, was designated in the bond as being "now claimed by the said Walworth on the books of the register of claims;" whereas the answer asserts, that after "the execution and delivery" of the bond, Walworth ascertained the premises "to be inserted, and intended to be described in said bond," to be the northwest

quarter of section 36; and that Walworth, immediately "thereafter," made claim thereto, and had the same registered with I. A. Lapham. There was not, therefore, in fact any existing claim of Walworth to which the language of the bond could apply at the time of its execution and delivery. I could not, therefore, in view of this admission in the answer, regard that portion of the bond as otherwise than nugatory, at least for the purposes of the defendant.

Again: It is alleged by the defendant that the contract was in violation of the act of Congress, and of public policy. So far as the bond in question is concerned, I see nothing of the kind. If I might regard the transactions with Frisbie properly before the court, and I have so regarded them in making this decision, the bond of Frisbie to Walworth would not be free from doubt; still, on a careful examination of its terms, I am of opinion that it does not expressly come within the statute. An agreement not to appear and bid at the public land sale may have been intended, but it is not expressed, and I think it cannot fairly be implied.

Again: It was contended that this was not a case where parol evidence could be admitted. I am compelled to believe otherwise. The bond is but a part of the entire transaction. It is enough to take the case out of the statute of frauds; but for the purpose of showing what, really and truly, the actual agreement between the parties was, parol proof, not inconsistent with the written instrument, was admissible. Clearly it could not be admitted for the purpose of showing other, or collateral, transactions or agreements. The evidence in regard to Arnold's agreement to make improvements, for the purpose of securing a claim or pre-emption right, was probably of the latter class.

Again: I have not been quite clear that this court, in view of the inability of Walworth to fulfil his agreement entire, should not decree a payment back by him of the purchase money, or of the consideration of the bond. The fact that Foster went into possession and made improvements has controlled my decision on that point; and this brings me to the final point, that there was no consideration for the bond.

Admitting the defendant's evidence to be competent, and his answer responsive to the bill, in this respect, I am still satisfied there was a sufficient consideration. If it were reduced to the question of a naked conveyance of a claim on Government lands, where a deed was executed and possession surrendered or delivered, there is, in my judgment, enough done and suffered by the promisee, at the request of the promissor, to constitute a legal consideration.

Considerations of public policy, a sense of justice, and a regard for the spirit and substance of the law relating to contracts, have led me heretofore to decide this point, and my views are unchanged.

LEVI HUBBELL.

Dated January 25, 1851.

Memorandum.

And afterwards, to wit, on the 29th day of May, in the year of our Lord one thousand eight hundred and fifty-one, the said appellant, by

his solicitors aforesaid, filed in the office of the clerk of the supreme court aforesaid his notice of argument, agreeably to the rules and practice of said court; which said notice, and the affidavit of service of a copy of the same, is in the words and figures following, to wit:

Notice of argument.

Supreme court of the State of Wisconsin.

CLINTON WALWORTH, appellant,
vs.
JAMES KNEELAND and others, appellees.

Appeal in chancery from the decree of the circuit court for the county of Milwaukee.

Notice is hereby given that this cause will be brought on to argument at the term of the supreme court of the State of Wisconsin next to be holden at Madison, in said State, on the third Tuesday of June, A. D. 1851, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

J. DOWNER & RYAN,
Solicitors for appellant.

To HOLLIDAY, BROWN & OGDEN,
and F. RANDALL,
Solicitors for appellees.

Affidavit of service.

STATE OF WISCONSIN,
County of Milwaukee, ss.

Leander Wyman, being sworn, doth depose and say, that he delivered a notice to the within named F. Randall, of which the within notice is a true copy, on the 6th day of May, 1851.

LEANDER WYMAN.

Subscribed and sworn to before me, this 27th day of May, 1851.
ANDREW LEINHART,
Notary public of Milwaukee county, Wis.

Memorandum.

And afterwards, to wit, at the June term aforesaid of said court, before the judges aforesaid, to wit, on the 23d day of June, A. D. 1851, it being the seventh day of said term, the following proceedings were had in this cause, to wit:

Record.

JAMES KNEELAND, Wife, and others, appellees,
vs.
CLINTON WALWORTH and others, appellants.

Appeal from Milwaukee county.

And now at this day come the said parties, by their solicitors, James S. Brown, for the said appellees, and E. G. Ryan and Jason Downer, for the said appellants, and their arguments on the errors assigned in this cause, having been commenced and partly heard, for want of time to complete the same, this cause is continued for further argument and opinion.

Memorandum.

And afterwards, at this same term of said court, to wit, on the 24th day of June, A. D. 1851, it being the eighth day of said term, the following further proceedings were had in this cause, to wit:

Record.

JAMES KNEELAND and Wife, and others, appellees,
vs.
CLINTON WALWORTH and others, app'ts.

Appeal in chancery from Milwaukie county.

And now, at this day, come the parties herein, by their solicitors, James S. Brown, for the said appellees, and Jason Downer and Edward G. Ryan, for the said appellants, and their arguments on the matters and things in the bill, answer, and proofs exhibited herein, having been resumed, completed, and fully heard, the court not being now sufficiently advised of and concerning the same, took time to consider of its opinion.

Memorandum.

And afterwards, at this same term of said court, to wit, on the 3d day of July, A. D. 1851, it being the seventeenth day of said term, the following judgment and decree was made and entered in this cause, to wit:

Decree and judgment.

JAMES KNEELAND and Wife, and others, appellees,
vs.
CLINTON WALWORTH & others, appellants.

Appeal from Milwaukee county.

The court being now sufficiently advised of and concerning the matters and things in the bill, answer, and proofs exhibited herein, from an inspection of the same, and the arguments of counsel thereon—

It is considered, ordered, adjudged, and decreed, by the court here, that the decree of the circuit court for Milwaukee county in this cause, be, and the same is hereby, affirmed, with costs, to the said appellees;

1785.

and it is also adjudged and decreed, by the court here, that the said appellees do have and recover of the said appellants the sum of fifty dollars for their damages, upon the affirmance of the decree herein; and it is ordered, that the same be certified to the circuit court for Milwaukee county, to be carried into execution.

Memorandum.

And afterwards, to wit, on the 12th day of February, A. D. 1852, the said appellant, by his solicitors aforesaid, filed in the clerk's office aforesaid the certificate of the Hon. Edward V. Whiton, present chief justice of said supreme court, of the points raised on the argument of this cause in said court as aforesaid; which said certificate is in the words and figures following, to wit:

Certificate of points raised.

STATE OF WISCONSIN, *Supreme court.*

JAMES KNEELAND, Hannah M. Kneeland, his wife, Frances Cornelia Foster and William Foster, infants, by their next friend, James Kneeland, appellees,
vs.
CLINTON WALWORTH, impleaded, &c., defendant and appellant.

Be it remembered, that, at the hearing and argument of this cause in the supreme court, the defendant, Clinton Walworth, by his counsel, insisted, that the contract mentioned in the bill of complaint was made in violation of the statutes of the United States, and void; more particularly, that it was made in violation of an act of Congress, approved March 3d, 1807, entitled "An act to prevent settlements on lands ceded to the United States, until authorized by law;" also, in violation of the fourth and fifth sections of an act of Congress, approved March 31st, 1830, entitled "An act for the relief of purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States;" also, if the contract had ever any validity, that the act of Congress granting the land in question to the Territory of Wisconsin, repealed or rendered null the contract.

The foregoing points were presented at the hearing, and argued by counsel for said Walworth; and the court being of opinion that none of said points were well taken, affirmed the decree of the court below.

All of which, at the request, and on motion of said Walworth, by his counsel, the court have here caused to be certified, enrolled, and made part of the record.

Dated this second day of February, 1852.

EDWARD V. WHITON, [L. S.]
Chief justice.

Certificate.

STATE OF WISCONSIN,
Supreme court, ss:

I, Samuel W. Beall, clerk of the supreme court of the State of Wisconsin, do hereby certify, that the above and foregoing is a true and correct copy of the original papers filed in the above entitled cause, together with the transcript of the record of the proceedings had in said cause in the court below; and also a true and correct transcript of the record of the proceedings in said cause in the supreme court aforesaid, as the same remain on file and of record in my office.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at Madison, this tenth day of August, in [SEAL.] the year of our Lord one thousand eight hundred and fifty-two.

SAM. W. BEALL,
Clerk sup. court, Wis.
By L. F. KELLOGG,
Deputy.

Fee for this transcript, 312 folios, 12½ - -	$39 00	
Certificate and seal - - - -	1 25	
		$40 25
Other costs on U. S. writ, as per bill taxed - -		5 93½
		$46 18½

Received payment of J. Downer, esq., attorney for plaintiff in error.
SAM. W. BEALL, *Clerk*,
By L. F. KELLOGG, *Deputy*.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the supreme court of the State of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, wherein Clinton Walworth, impleaded with Phœbe Walworth, George Reed, and Augustus Story, is appellant, and James Kneeland and Hannah M. Kneeland, his wife, and Frances Cornelia Foster and William Foster, infants, by their next friend James Kneeland, are appellees; wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground

of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Clinton Walworth, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-one.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Allowed by

EDWARD V. WHITON,
Chief justice of the Supreme Court of the State of Wisconsin.

The return to the within writ of error appears by the schedule hereunto annexed. The answer of the judges of the supreme court of the State of Wisconsin.

SAM'L W. BEALL, *Clerk*,
By L. F. KELLOGG, *Deputy*.

Served this writ by leaving a copy thereof for the defendant in error, in the office of the clerk of the supreme court of the State of Wisconsin and with said clerk, April 9th, 1852.

J. DOWNER.

Citation and service.

The United States of America, to James Kneeland, Hannah M. Kneeland, his wife, and Frances Cornelia Foster and William Foster, infants, by their next friend James Kneeland, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ error, filed in the clerk's

office of the supreme court of the State of Wisconsin, wherein Clinton Walworth is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Edward V. Whiton, chief justice of the supreme court of the State of Wisconsin, this first day of May, in the the year of our Lord one thousand eight hundred fifty-two.

EDWARD V. WHITON,
Chief justice of the Supreme Court of the State of Wisconsin.

ALBERT SMITH,
Attorney and Solicitor for Walworth.

STATE OF WISCONSIN,
County of Milwaukee, ss:

On this 18th day of May, A. D. 1852, personally appeared before me Andrew Leinhart, who being duly sworn by me on oath saith, that he delivered to the within named James Kneeland, Hannah M. Kneeland, his wife, and Frances Cornelia Foster, on the 15th day of May, 1852, to each a true copy of this citation, and showed them the original.

ANDREW LEINHART.

Subscribed and sworn to before me, this 18th day of May, 1852.

JOHN E. FORCE,
Notary public, Mil. co.

Fees for service $1 12½.

Writ of error.

STATE OF WISCONSIN,
County of Dane.

I, Jason Downer, being duly sworn, doth depose and say, that he showed the within citation to Mr. Brown, of the firm of Brown & Ogden, volunteers for the complainants below, defendants in error, and delivered to said Brown a copy of this citation on the 19th day of June, 1852.

J. DOWNER.

Subscribed and sworn to before me, this 14th day of June, A. D. 1852.

SAM'L W. BEALL,
Clerk Supreme Court, Wisconsin.
By L. F. KELLOGG,
Deputy.

Filed June 24, 1852.

L. F. KELLOGG, *Dept Clerk.*

Copy of bond to prosecute writ of error.

Know all men by these presents, that we, Clinton Walworth, principal, and Franklin J. Blan, and Jason Downer, sureties, are held and firmly bound unto James Kneeland, Hannah M. Kneeland, his wife, and Frances Cornelia Foster and William Foster, infants, by their next friend James Kneeland, in the full and just sum of one thousand dollars, to be paid to the said James Kneeland, Hannah M. Kneeland, his wife, and Frances Cornelia Foster and William Foster, infants, by their next friend James Kneeland, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 19th day of March, in the year of our Lord one thousand eight hundred and fifty-two.

Whereas lately, at a supreme court of the State of Wisconsin, in a suit pending in said court, wherein Clinton Walworth, impleaded with Phœbe Walworth, George Reed, and Augustus Story, is appellant, and the said James Kneeland, Hannah M. Kneeland, his wife, and Frances Cornelia Foster and William Foster, infants, by their next friend James Kneeland, are appellees, a decree was rendered against the said Clinton Walworth; and the said Clinton Walworth, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said James Kneeland, Hannah M. Kneeland, his wife, and Frances Cornelia Foster and William Foster, infants, by their next friend James Kneeland, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such, that if the said Clinton Walworth shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

C. WALWORTH, [SEAL.]
JASON DOWNER, [SEAL.]
F. J. BLAN. [SEAL.]

Sealed and deliver in presence of—
HENRY NEWBOURN.

Approved by EDWARD V. WHITON,
Chief justice of the Supreme Court of the State of Wisconsin.

STATE OF WISCONSIN,
Supreme court, ss:

I certify the within to be a true and correct copy of the original bond in the within entitled cause, as the same remains on file and of record in my office.